1358

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 101.

THE WESTERN UNION TELEGRAPH COMPANY, PLAINTIFF IN ERROR,

vs.

THE BOROUGH OF NEW HOPE.

IN ERROR TO THE SUPERIOR COURT OF THE STATE OF PENNSYLVANIA.

FILED MAY 20, 1901.

(18,173.)

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JUNE 24, 1902.

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1 In the Superior Court of Pennsylvania, Sitting at Philadelphia.

Among the records and proceedings of the superior court of Pennsylvania sitting at Philadelphia, *inter alia*, the following is thus contained:

In the Superior Court of Pennsylvania, of October Term, 1900.

THE BOROUGH OF NEW HOPE, Appellee,
v.
THE WESTERN UNION TELEGRAPH CO., Appellant. } No. 101.

Petition for Writ of Error.

To the Honorable George Shiras, Jr., associate justice of the Supreme Court of the United States:

The petition of the Western Union Telegraph Company respectfully represents:

That your petitioner brought suit into the superior court of Pennsylvania, for the eastern district, to October term, 1900 No. 101, by writ of certiorari to an appeal from a decree of the court of common pleas of Bucks county, of January term 1899, No. 11, in which suit in said superior court your petitioner was appellant and defendant in the said court of common pleas; and The Borough of New Hope was appellee in said superior court and plaintiff in said court of common pleas.

2 The claim of the plaintiff, said Borough of New Hope, against the defendant was for license fees for four years from 1895 to 1898 (inclusive) sought to be imposed upon the defendant by a certain ordinance of the borough of New Hope passed upon the tenth day of July 1894, by which it was provided that for the maintenance of each and every telegraph, telephone and electric light pole within the limits of the said borough the owner or lessee thereof should pay to the borough treasurer an annual license fee of one dollar, and for the maintenance of each and every mile of telegraph, telephone and electric light wire two dollars and a half. Claim was made in the suit for such license fees upon seventy-five poles and twenty-five miles of wire for the years aforesaid. The poles and wires situate in the borough of New Hope, and upon which these license fees were sought to be imposed, were used by the defendant solely for the transmission of telegraphic messages between the different States of the United States and for cable messages to be transmitted from the United States to other countries, and no local business arising in said borough of New Hope was carried on by the defendant, and no office was maintained by it in said borough. There was no cost or expense imposed upon the said borough, as was affirmatively shown on the trial of the cause; nor was there any supervision or regulation whatsoever by the said

borough of said poles and wires. The defendant alleged in its affidavit of defence that under these circumstances there was no
3 power in the borough of New Hope to levy such a license tax, by ordinance or otherwise, or any authority for so doing, since the defendant in the transaction of the business carried on by means of said poles and wires was engaged in the transaction of commerce between the States and between the United States and foreign countries, and that the attempted imposition of the license fees in question was in fact a regulation of commerce between the States, and that the ordinance was therefore void.

The facts above outlined were set forth upon the trial and in the testimony, and upon said trial the court was requested to charge as follows:

"1. It appears from the uncontradicted evidence in this case that the poles and wires in the borough of New Hope, to recover for the charges upon which this suit is brought, form a part of the system of poles and wires of the defendant company extending into and through the other States and Territories of the United States over and along which system of poles and wires including therein the said poles and wires in the borough of New Hope, communication by electricity is carried on and messages transmitted by said defendant company to and from citizens from other States and to and from such citizens of other States, from and to citizens of the State of Pennsylvania, which said business is commerce between the States within the meaning of the Constitution of the United States; therefore the borough of New Hope has no right to impose any charge for the privilege of erecting and maintaining said poles and
4 wires in said borough, except only such sum as will reasonably cover and reimburse to it the expenses to which it may be subjected in consequence of the erection and maintenance of said poles and wires, and if the license fee sued for in this case exceed said sum, your verdict should be for the defendant.

2. It appears from the uncontradicted evidence in this case that no costs or expenses are imposed upon the borough of New Hope in consequence of the erection and maintenance of the poles and wires of the defendant company; and as said borough is without the power to exact any charge for the maintenance of said telegraph poles and wires the ordinance of the said borough of July 10th, 1894, sued on in this case, is void, and the verdict of the jury should be for the defendant."

The trial judge affirmed the first of these points and refused the second.

The verdict of the jury upon the said trial was in favor of the plaintiff for the sum of three hundred and seventy-seven and forty-hundredths ($377.40) dollars, which was the full amount claimed, and judgment was duly entered thereon.

From this judgment an appeal was taken to the superior court of Pennsylvania, for the eastern district, of October term 1900, No. 101. Upon the appeal the answer of the judge to the second point, as well as his refusal of the fourth point, which was as follows:

"Under all the evidence in this case, the verdict of the jury should be for the defendant,"

5 were, *inter alia*, assigned as error, and the said superior court by an opinion filed therein upon the 14th day of February, A. D. 1901, copy of which opinion is hereunto annexed, duly affirmed said judgment.

By the statutes of the State of Pennsylvania the said superior court is given exclusive and final appellate jurisdiction of "any action, claim, distribution, or dispute of any kind in the common pleas, at law or in equity, whether originating therein or reaching that court by appeal or certiorari from a justice of the peace or alderman or magistrate, if the subject of the controversy be either money, chattels, real or personal, or the possession of or title to real property, and if also the amount or value thereof really in controversy be not greater than fifteen hundred dollars, exclusive of costs, and if also the action be not brought, authorized or defended by the attorney general in his official capacity."

Provided, "nevertheless in any action or proceeding whatever above committed to the final and exclusive decision of the said court, there may still be an appeal from its judgment to the supreme court:

First. If the jurisdiction of the superior court is in issue; or

Second. If the case involves the construction or application of the Constitution of the United States or of any statute or treaty of the United States; or

6 Third. If the case involves the construction or application of the constitution of Pennsylvania; or

Fourth. If the appeal to the supreme court be specially allowed by the superior court itself or by any one justice of the supreme court."

That by the construction of this act by the supreme court of the State of Pennsylvania, and the rules and practice of said court, no appeal is allowed to be taken from said superior court to said supreme court in any case, unless the same be allowed by the said supreme court upon presentation to it of a petition duly praying for the allowance thereof.

That after the said opinion of the superior court affirming the judgment of the said court of common pleas had been filed, your petitioner duly presented its petition to the supreme court of Pennsylvania asking for the allowance of an appeal from the said judgment of the superior court and for a writ of certiorari to be issued in said cause, but the prayer of the petitioner was refused by the said supreme court and the record of said cause remains and is in said superior court of Pennsylvania.

That the said judgment of the said superior court of Pennsylvania is therefore and has become the judgment of the highest court of record of the Commonwealth of Pennsylvania in which under the laws of said State, a decision can be had.

That the judgment of the said court is final.

7 That the right, title, privilege and immunity claimed by your petitioner, defendant and appellant aforesaid, were claimed under the Constitution of the United States, article I, section 8, paragraph 3, which provides that Congress shall have "power * * * to regulate commerce with foreign nations and among the several States and with the Indian tribes," all which appears of record; that the question involved was the power of the Borough of New Hope to impose said license fees and taxes by reason of the provisions of article 1, section 8, paragraph 3, of the Constitution of the United States as aforesaid, and whether or not said ordinance was a regulation of commerce between the States, which the said Borough of New Hope had no power to enact and which was in conflict with the provisions of the Constitution of the United States.

Your petitioner further avers that it denied in this case the right of the Borough of New Hope to impose any license fees whatsoever upon its poles and wires because the same was in fact a regulation of commerce between the States, and their imposition is not justified by any police power existing, or claimed to exist, in the said Borough of New Hope, and that said police power affords no authority or right to impose said fees or any fees upon said poles and wires.

That the decision and judgment of the superior court of Pennsylvania aforesaid was against the right, title, privilege and immunity so claimed.

8 Your petitioner therefore prays for the allowance of a writ of error to the superior court of Pennsylvania, in order that the said judgment of the superior court of Pennsylvania may be re-examined and reversed, or affirmed, in the Supreme Court of the United States.

And your petitioner will ever pray, etc.

THE WESTERN UNION TELEGRAPH COMPANY,
By THOS. F. CLARK, *Vice-President.*

[SEAL.] A. R. BREWER, *Secretary.*

STATE OF NEW YORK, } *ss:*
County of New York, }

Thomas F. Clark being duly sworn according to law, deposes and says that he is the vice-president of The Western Union Telegraph Company, the above-named petitioner, and on behalf of the said company says that the facts set forth in the foregoing petition are true, to the best of his knowledge and belief.

THOS. F. CLARK.

Sworn to and subscribed before me this 18th day of March, A. D. 1901.

[SEAL.] E. A. MACCLEAN,
Notary Public, N. Y. Co., No. 1.

9 In the Superior Court of Pennsylvania.

BOROUGH OF NEW HOPE
v.
WESTERN UNION TELEGRAPH CO. } No. 101, Oct. Term, 1900. Appeal from Judgment of C. P. of Bucks Co.

Filed Feb. 14, 1901.

Per Curiam:

It has been decided, first, that the adoption by a city of an ordinance imposing a reasonable annual license fee for each pole and each mile of suspended wire erected and maintained by telegraph, telephone and electric light companies within city limits is a valid exercise of police power; second, that boroughs have equal powers with cities in that regard; third, that such ordinance is not, as to telegraph companies engaged in the business of transmitting messages between the several States of the Union, in violation of the commerce clause of the Federal Constitution; fourth, that in an action to recover the license fee for a particular year, the same being payable at the beginning of the year, the fact that the borough or city did not expend money for inspection, supervision, or police surveillance of the poles and wires in that year is not a defense; fifth, that the courts will not declare such ordinance void because of the alleged unreasonableness of the fee charged unless the unreasonableness be so clearly apparent as to demonstrate an abuse of
10 discretion on the part of the municipal authorities: W. U. Tel. Co. *v.* Philadelphia, 22 W. N. C. 39; S. C. 11 Cent. Rep. 102; Allentown *v.* W. U. Tel. Co., 148 Pa. 117; Chester *v.* P. R. & P. Tel. Co., 148 Pa. 120; Chester *v.* W. U. Tel. Co., 154 Pa. 466; Philadelphia *v.* Am. Union Tel. Co., 167 Pa. 406; Ridley Park *v.* Citizens' Electric Light & Power Co., 9 Pa. Superior Ct. 615; Lansdowne *v.* Same, 9 Pa. Superior Ct. 620; North Braddock *v.* Central etc. Tel. Co., 11 Pa. Superior Ct., 24; Kittanning Electric Light Co. *v.* Kittanning, 11 Pa. Superior Ct. 31. See also McKeesport *v.* McKeesport, etc. R'y Co., 2 Pa. Superior Ct. 242; North Braddock *v.* Second Ave. Tr. Co., 8 Pa Superior Ct. 233; Lansdowne *v.* Delaware etc. Electric R'y Co., 9 Pa. Superior Ct. 621; and Taylor *v.* C. P. Tel. etc. Co., 8 Pa. Dist. Rep. 92.

In many of the foregoing cases the license fee was the same as that imposed by the ordinance under consideration. In none of the cases was the ordinance declared void for unreasonableness, although it was inferentially conceded that a case might arise where the license fee would be so grossly disproportioned to the burden imposed upon the municipality in consequence of the erection and maintenance of the poles and wires as to warrant the court in presuming that the ordinance was a revenue measure, not a police regulation. None of the cases lays down a fixed and invariable
11 rule by which that question is to be determined, but after a comparison of the facts developed on the trial of this case, with the facts of some of the cases above cited, we have been led *by* the conclusion that the court would not have been justified by the precedents in declaring the ordinance void. The facts being

undisputed, we take it that the question of the validity of the ordinance was for the court to decide. But, if on the undisputed facts, the court would not have been warranted in declaring the ordinance void, the submission of the question of the reasonableness of the fee to the jury was an error of which the defendant has no just cause to complain.

Judgment affirmed.

STATE OF PENNSYLVANIA, } ss:
Philadelphia, }

I, Charles S. Greene, prothonotary of the superior court of Pennsylvania, do hereby certify that the above and foregoing is a true copy of the opinion in the above-entitled cause, so full and entire as appears of record in said court.

In testimony whereof, I have hereunto set my hand and
[SEAL.] affixed the seal of said court, at Philadelphia this 15th day of February, A. D. 1901.

CHAS. S. GREENE, *Prothonotary.*

12 Endorsement: 101. October T. 1900. Superior court of Pennsylvania The Borough of New Hope, appellee, *v.* The Western Union Telegraph Co., appellants. Petition for writ of error. And now, to wit, April 22d 1901, citation awarded and writ of error allowed by me. George Shiras, Jr. associate justice of the Supreme Ct. of U. S. Read & Pettit Filed April 23, 1901. In superior court.

13 UNITED STATES OF AMERICA, ss:

[Seal of the Supreme Court of the United States.]

The President of the United Statesof America to the honorable the judges of the superior court of the State of Pennsylvania, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said superior court before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in said suit between The Western Union Telegraph Company, appellant, and The Borough of New Hope, appellee, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Con-
14 stitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a man

fest error hath happened to the great damage of the said appellant as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 22d day of April, in the year of our Lord one thousand nine hundred and one.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by

GEORGE SHIRAS, Jr.,
Associate Justice of the Supreme Court of the United States.

15 *Citation.*

UNITED STATES OF AMERICA, *ss:*

To the Borough of New Hope, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the clerk's office of the superior court of the State of Pennsylvania, wherein The Western Union Telegraph Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable George Shiras, Jr., associate justice of the Supreme Court of the United States, this 22d day of April, in the year of our Lord one thousand nine hundred and one.

GEORGE SHIRAS, Jr.,
Associate Justice of the Supreme Court of the United States.

15½ April 25, 1901.—Service of the within citation is hereby accepted.

WM. C. RYAN,
Att'y for Defendant in Error.

16 *Bond Surwrit of Error to Supreme Court of United States.*

THE WESTERN UNION TELEGRAPH COMPANY, Plaintiff in Error,
v.
THE BOROUGH OF NEW HOPE, Defendant in Error.

Know all men by these presents that the Western Union Telegraph Company as principal and W. B. Gill of Philadelphia as surety are held and firmly bound unto the Borough of New Hope in the full and just sum of seven hundred and fifty-four and eighty-hundredths ($754.80) dollars, to be paid to the said The Borough of New Hope, its certain attorney, successors or assigns; to which payment well and truly to be made we do bind ourselves, and our heirs, executors, administrators, successors or assigns, jointly and severally firmly by these presents.

Sealed with our seals and dated this 18th day of March, anno Domini one thousand nine hundred and one.

Whereas, lately, in the court of common pleas, in and for the county of Bucks and State of Pennsylvania, judgment was entered against the Western Union Telegraph Company at the suit of the Borough of New Hope, of January term, 1899, No. 11, which judgment was afterwards affirmed by the superior court of the
17 State of Pennsylvania in a certain plea and suit in said court, of October term 1900, No. 101. And the said The Western Union Telegraph Company having obtained a writ of error to the Supreme Court of the United States to reverse the said judgment rendered in the last above-entitled action; having filed a copy thereof in the office of the prothonotary of said court and a citation directed to the said The Borough of New Hope citing and admonishing it to be and appear in the Supreme Court of the United States, to be holden at Washington the second Monday of October next:

Now the condition of the above obligation is such: that if the said The Western Union Telegraph Company shall prosecute their said writ of error to effect and answer all damages and costs, if they shall fail to make their plea good, then the above obligation to be void, or else to remain in full force and virtue.

THE WESTERN UNION TELEGRAPH COMPANY,
By THOS. F. CLARK, *Vice-President.*
[SEAL.] A. R. BREWER, *Secretary.*
W. B. GILL. [SEAL.]

Sealed and delivered in the presence of
E. A. MACCLEAN.

Witness as to W. B. Gill,
J. M. PEOPLES.

Ap'l 22d, 1901.—The foregoing bond is approved.
GEORGE SHIRAS, JR.,
Associate Justice of the Supreme Ct. of U. S.

18 Endorsement: 101 October T. 1900. Superior court of Pennsylvania. The Borough of New Hope, appellee, *v.* The Western Union Telegraph Co., appellant. Bond and approval of surety. Filed April 23, 1901. In superior court. Read & Pettit.

19 *Appearance Docket.*

Superior Court, October Term, 1900.

Docket Entries.

THE BOROUGH OF NEW HOPE, Plaintiff,
v.
THE WESTERN UNION TELEGRAPH COMPANY, Defendant. } 101.

Robert M. Yardley.
Read & Pettit.

Appeal of defendant.

C. P. 11, Jan'y term, 1899, from the judgment.

Appeal from the court of common pleas of the county of Bucks.

Filed April 24, 1900.
Eo die.—Certiorari exit ret-ble the third Monday of November 1900.
July 26, 1900.—Record returned and filed.
September 27, 1900.—Assignments of error filed.
November 20, 1900.—Argued.
February 14, 1901.—Judgment affirmed.
Per curiam.

In Supreme Court.

Filed Feb'y 25, 1901.

Petition of Western Union Telegraph Co. for allowance of an appeal from the superior court to the supreme court on motion of Read & Pettit, Esqs.
March 7, 1901.—Appeal refused.
Per curiam.
20 March 20, 1901.—Order by Rice, P. J. to hold the record until further order filed.
April 23rd, 1901.—Petition for writ of error to the Supreme Court of the United States and allowance of citation and writ of error by George Shiras, Jr., associate justice of Supreme Court of the United States.
Eo die.—Bond and approval of surety by Hon. George Shiras, Jr. filed.
Eo die.—Writ of error to the Supreme Court of the United States returnable within thirty days from April 22nd 1901 brought into office.
May 13, 1901.—Citation with service brought into office.
Eo die.—Assignments of error to the Supreme Court of the United States brought into office.

21 *Appeal and Affidavit.*

In the Superior Court of Pennsylvania, Sitting at Philadelphia.

Court of Common Pleas of the County of Bucks.

THE BOROUGH OF NEW HOPE, Plaintiff,
v.
THE WESTERN UNION TELEGRAPH COMPANY, Defendant.
} January Term, 1899, No. 11.

Enter appeal on behalf of The Western Union Telegraph Co. defendant, from judgment of the court of common pleas of the county of Bucks.

ROBERT M. YARDLEY,
READ & PETTIT,
Att'ys for Appellant.

To Charles S. Greene, proth'y sup. ct.

COUNTY OF PHILADELPHIA, *ss:*

A. G. Saylor, manager of The Western Union Telegraph Co., appellant, being duly sworn saith that said appeal is not taken for the purpose of delay, but because appellant believes it has suffered injustice by the judgment from which it appeals.

A. G. SAYLOR,
Manager Western Union Tel. Co.

Sworn to and subscribed this 24th day of April, A. D. 1900, before me

LOUIS B. RUNK,
Notary Public.

22 Endorsement: No. 101 October term, 1900. Superior court of Pennsylvania. Sitting at Philadelphia. 530 The Borough of New Hope *v.* The Western Union Telegraph Co., appellant. Appeal and affidavit. Filed Apr. 24, 1900. In the superior court. Rob't M. Yardley Read & Pettit attorney- for appellant.

Præcipe for Certiorari.

In the Superior Court of Pennsylvania, Sitting at Philadelphia.

THE WESTERN UNION TELEGRAPH COMPANY, Appellant. No. 11.

Certiorari to the court of common pleas of the county of Bucks, of January term, 1899.

Issue certiorari to the court of common pleas of the county of Bucks to bring up record and proceedings in a certain action in said court, No. 11 January term, 1899 wherein The Borough of New

Hope was plaintiff and The Western Union Telegraph Co. defendant.

Returnable to next term, *sec. reg.*

To Charles S. Greene, prothonotary, superior court—sitting at Philadelphia.

ROBERT M. YARDLEY,
READ & PETTIT,
Attorney- for Appellant.

23 Endorsement: No. 101 October term, 1900. Superior court of Pennsylvania, sitting at Philadelphia. The Borough of New Hope *v.* The Western Union Telegraph Co., appellant. Præcipe for certiorari Filed April 24, 1900. In the superior court. Rob't M. Yardley Read & Pettit attorney- for appellant.

Record of the Court of Common Pleas of the County of Bucks.

COMMONWEALTH OF PENNSYLVANIA, *Bucks County,* } *ss:*

Among the records and proceedings of the court of common pleas in and for the county of Bucks, in the State of Pennsylvania, it is, *inter alia,* thus contained:

Number 37.

Appearance Docket Entries.

Of January Term, 1899. No. 11.

DEC. 22.

THE BOROUGH OF NEW HOPE *v.* THE WESTERN UNION TELEGRAPH COMPANY. } 11. Action of Assumpsit.

William C. Ryan.
Robert M. Yardley.

December 22nd, 1898.—Statement of plaintiff's claim filed.
January 3rd, 1899.—Defendant's affidavit of defense filed.

Costs.

Sheriff	$5.70
1 Sup. P.	.60
24 Proth'y	3.50
Att'y	3.00
T. & W.	2.00
Cr.	.13
Dis.	.25
Verdict	4.00
Judg.	1.25
	$20.43

To the hon. the judge within named:

December 23rd, 1898.—Summoned The Western Union Telegraph Company the within-named defendant by leaving a true and attested copy of the within writ with A. G. Saylor, manager of said defendant company at the superintendant's office at 10th and Chestnut streets Philadelphia and informing him of the contents thereof.

So answers

IRVIN AARON, *Sheriff.*

I Warren S. Ely, do certify that I served the plaintiff's statement of demand in the within-mentioned suit on The Western Union Telegraph Company the within-named defendant by leaving a true and attested copy with A. G. Saylor manager of said defendant company at the superintendant's office, at 10th and Chestnut streets Philadelphia and informing him of the contents thereof on December 23rd 1898.

WARREN S. ELY.

Affirmed and subscribed before me this 24th day of December A. D. 1898.

EMIL W. HARING,
Prothonotary.

March 16th, A. D. 1899.—The plaintiff by its attorney moves for the entry of a plea.

April 3rd, 1899.—Proof of notice of entry of a motion for a plea filed.

25 *Ei die.*—Plea of non-assumpsit entered by prothonotary.

April 17th, 1899.—Continued.

October 17th, A. D. 1899.—Jury empaneled and sworn.

Eo die.—Verdict in favor of the plaintiff for the sum of $377.40 *dollars* and six cents costs.

October 19th, 1899.—Motion and reasons for new trial filed.

October 27th, 1899.—Notes of testimony filed.

December 5th, A. D. 1899.—Argued and *C. A. V.*

And now to wit: February 26th 1900 the rule is discharged and judgment for plaintiff.

HARMAN YERKES,
President Judge.

March 8th, 1900.—Received of William C. Ryan Esq. $4.00 *dollars* verdict fee.

March 8th, A. D. 1900.—Judgment entered. Taxed to docket No. 33 page 252.

April 26th, 1900.—Certiorari from superior court came to hand.

June 12th, A. D. 1900.—Bond of appellant filed.

Præcipe for Summons.

In the Court of Common Pleas of Bucks County.

THE BOROUGH OF NEW HOPE
v.
THE WESTERN UNION TELEGRAPH CO. } No. 11, January Term, 1899. Action of Assumpsit.

26 Emil W. Haring, Esq., prothonotary:

Issue summons in action of assumpsit as above. Returnable next term.

WM. C. RYAN,
Att'y for Plaintiff.

Dec. 22, 1898.

Endorsement: No. 11 January term 1899. In the court of common pleas of Bucks county. Borough of New Hope *v.* Western Union Tel. Company. Præcipe for summons. Filed Dec. 22, 1898. Wm. C. Ryan, att'y.

Action of Assumpsit.

BUCKS COUNTY, *ss:*

The Commonwealth of Pennsylvania to the sheriff of the county of Bucks, Greeting:

We command you, that you summon the Western Union Telegraph Company so that it be and appear before our court of common pleas, to be holden at Doylestown, in and for the said county, on the second day of January next, there to answer the Borough of New Hope in an action of assumpsit. And have you then there this writ.

27 Witness, the Honorable Harman Yerkes, president of our said court at Doylestown, this twenty-second day of December, in the year of our Lord one thousand eight hundred and ninety-eight.

[SEAL.] EMIL W. HARING,
Prothonotary.

Proof of Service of Summons.

To the hon. the judge within named:

December 23rd 1898 summoned The Western Union Telegraph Company the within-named defendant by leaving a true and attested copy of the within writ with A. G. Saylor manager of said defendant company, at the superintendent's office at 10th and Chestnut streets Philadelphia and informing him of the contents thereof.

So answers

IRVIN AARON, *Sheriff.*

I, Warren S. Ely do hereby certify that I served the plaintiff's statement of demand in the within-mentioned suit on The Western Union Telegraph Company the within-named defendant by leaving a true and attested copy with A. G. Saylor manager of said defendant company at the superintendant's office at 10th and Chestnut streets Philadelphia and informing him of the contents
28 thereof on December 23rd A. D. 1898.

WARREN S. ELY.

Affirmed and subscribed before me this 24th day of December A. D. 1898.

EMIL W. HARING, *Proth'y.*

Endorsement: No. 11 January term 1899. The Borough of New Hope *v.* The Western Union Telegraph Company. Action of assumpsit.

To the defendant within named:

You are hereby notified that if a copy of the statement of plaintiff's demand is served on you not less than fifteen days before the return day of this writ, which will be the second day of January 1899 it will be your duty to file an affidavit of defense, on or before the said return day; or, if notice that plaintiff's statement of demand has been filed is served on you, on or after the said return day, it will be your duty to file an affidavit of defense within fifteen days after service on you of said notice.

EMIL W. HARING,
Prothonotary.
WM. C. RYAN, *Attorney.*

Sheriff's costs $5.70.

29 *Plaintiff's Statement.*

In the Court of Common Pleas of Bucks County.

THE BOROUGH OF NEW HOPE
v.
THE WESTERN UNION TELEGRAPH COMPANY.
} No. 11, January Term, 1899. Action of Assumpsit.

Plaintiff's statement of claim.

The plaintiff claims of the defendant the sum of $500, being the sum total of charges due to the said plaintiff by the defendant, according to the following specifications, with interest from the first day of October of each year hereinafter stated.

The proper authorities of the borough of New Hope, on the tenth day of July, A. D. 1894, duly passed an ordinance entitled "An ordinance for the regulation of the introduction and maintenance of telegraph, telephone and electric light poles, and wires into and in the borough of New Hope," a copy of which is hereto attached, marked Exhibit "A" that the same may be taken as a part of this statement.

The said defendant prior to and since the first day of October, A. D. 1895, has maintained and used telegraph poles and wires within the corporate limits of said borough as follows:

In the year beginning October 1, 1895, 75 poles, at $1.....	$75
In the year beginning October 1, 1896, 75 poles, at $1...	75
30 In the year beginning October 1, 1897, 75 poles, at $1...	75
In the year beginning October 1, 1898, 75 poles, at $1...	75
In the year beginning Oct. 1, 1895, 20 miles wire, $2.50.....	50
In the year beginning Oct. 1, 1896, 20 miles wire, $2.50.....	50
In the year beginning Oct. 1, 1897, 20 miles wire, $2.50.....	50
In the year beginning Oct. 1, 1898, 20 miles wire, $2.50..	50
	$500

By reason whereof the said defendant by force of said ordinance is indebted to the said plaintiff in the said sum of $500 with interest as aforesaid, wherefore said plaintiff brings its suit.

WM. C. RYAN,
Att'y for Plaintiff.

EXHIBIT A.

An ordinance for the regulation of the introduction and maintenance of telegraph, telephone and electric light poles and wires into and in the borough of New Hope.

SECTION 1. Be it ordained and enacted by the town council of the borough of New Hope, That before any telegraph, telephone or electric light poles shall be erected, or telegraph, telephone or electric light wires shall be run, along, over or under any street, lane or alley of the borough of New Hope, permission to do so shall be first obtained from the town council, by the corporation, firm or individual who proposes to erect such poles and run such wires, such permission to be granted by ordinance only.

SECTION 2. That all telegraph, telephone and electric light poles, now erected or to be erected hereafter, in the borough of New
31 Hope, which are or shall be owned or leased by any corporation, firm or individual, shall be designated by the names or initials of such owner of lessees, and each of said poles shall have a distinctive number, together with the name or initials of such owner or lessee, legibly marked thereon. On or before the 1st day of October next and annually thereafter, such owner or lessee shall make application to the burgess for a license to maintain the poles and wires theretofore erected, for the ensuing year, specifying the poles by their designation of name or initials and number, as provided by this section, and wires by the streets along, over or under which they run. The burgess shall, upon the production to him, by the applicant, of the receipt of the borough treasurer for the license fees hereinafter provided for, issue a license, which shall authorize the maintenance of the poles and wires designated in the application, for the period of one year from that date.

SECTION 3. That, for the maintenance of each and every telegraph, telephone and electric light pole within the limits of said borough of New Hope, the owner or lessee thereof shall pay to the borough treasurer an annual license fee of one dollar; and for the maintenance of each and every mile of telegraph, telephone and electric light wire within the limits of the said borough, the owner or lessee thereof shall pay to the borough treasurer for the use of said borough an annual license fee of two dollars and fifty cents.

32 SECTION 4. That any corporation, firm or individual, who shall fail to comply with the requirements of this ordinance, shall be subjected to a penalty of $100.00 for each and every offense, to be recovered in like manner as debts for penalties of like amount are recoverable.

By order of council.

C. C. B. JOHN, *Burgess.*

Attest: CHARLES HAIGH, *Secretary.*

New Hope, Pa., July 10th, 1894.

Endorsement: No. 11 Jan'y term 1899. In the court of common pleas of Bucks county. The Borough of New Hope *v.* The Western Union Telegraph Company. Action of assumpsit. Plaintiff's statement Filed Dec. 22nd 1898. Wm. C. Ryan. att'y.

Affidavit of Defence.

In the Court of Common Pleas of Bucks County.

THE BOROUGH OF NEW HOPE *v.* THE WESTERN UNION TEL. CO. } No. 11, January Term, 1899. Action of Assumpsit.

33 Affidavit of defence.

CITY AND COUNTY OF PHILADELPHIA, *ss:*

A. G. Saylor, being duly sworn according to law, deposes and says, that he is the manager of The Western Union Telegraph Company, the defendant above named, within the district including the county of Bucks in the State of Pennsylvania; and that the defendant has a good and legal defence to the whole of the plaintiff's claim in the above-stated case of the following nature and character, to wit:

The defendant is a corporation duly created, under and by virtue of the laws of the State of New York, on or about the first day of April, A. D. 1851, for the purpose of erecting, maintaining and operating lines of telegraph and with power to construct, maintain and operate such lines in and through the various States and Territories of the United States. On or about the fifth day of June, A. D. 1867 the said defendant did duly accept the provisions of the act of Congress approved the 24th day of July 1866, entitled, "An act to

aid in the construction of telegraph lines and to secure to the Government the use of the same for postal, military and other purposes;" and on or about the eighth day of June, A. D. 1867 did duly file its written acceptance of the restrictions and obligations required by the said act of Congress with the Postmaster General of the United States.

Under and by virtue of the power and authority aforesaid, as well as under and by virtue of the laws of the Commonwealth of
34 Pennsylvania it thereunto enabling, the said defendant during all the time for which the said alleged license fees are sought to be recovered, to wit, during the years 1895, 1896, 1897 and 1898, and still does, lawfully own, control and maintain lines of telegraph within the State of Pennsylvania of which the wires and poles to recover for the license fees upon which this suit is brought and erected and maintained within the limits of the borough of New Hope form a part, connecting with and forming parts of lines of telegraph extending between the various States of the United States and the Territories thereof for the communication of intelligence by electricity, in the erection and construction of which said lines of telegraph divers large sums of money have been expended.

Deponent avers that said poles and wires, to recover for the license fees upon which this suit is brought, were, during all the time aforesaid, maintained, used and operated by it for the transmission of intelligence by electricity to and from said borough of New Hope from and to other cities and States without the State of Pennsylvania and situate within the other States and Territories of the United States, and to and from other cities and places outside the State of Pennsylvania through the said borough of New Hope, and also from and to other countries beyond the limits of the United States; and that during all the time aforesaid said defendant was and still is daily in the receipt of messages from citizens of the said bor-
35 ough which they are by law obliged to and do transmit by telegraph over the said lines to other persons in the State of Pennsylvania and residing in the other States of the United States or in foreign countries; and are also in receipt of like messages from persons in other States and countries addressed to citizens in the said borough of New Hope, which by law they are obliged to and do receive, transmit and deliver to the said citizens of the said borough.

Deponent avers that the said alleged license fees so sought to be imposed by the said ordinance of the borough of New Hope are so imposed by it for the purpose of producing and would produce revenue to the borough of New Hope, not only over and above the cost of regulating and supervising the said telegraph poles and wires and the cost of issuing the licenses therefor, and all the ordinary and necessary expenses thereby imposed upon the said borough, but also over and above all extraordinary expenses, damages and costs arising from liability imposed upon the borough by reason of the erection and maintenance of said poles and wires, and over and above all other costs, expenses of government or otherwise, damages, liability for damages, injury, loss or possibility of

loss, whatsoever, imposed upon said borough by reason of the existence, erection and maintenance of said poles and wires, and that said fees and charges are many times more than the cost not only of erecting and supervising the said poles and wires and issuing
36 licenses therefor, and all other ordinary or necessary expenses imposed upon the said borough thereby, but also all other extraordinary expenses of said borough, or its municipal officers, damages arising from the erection and maintenance of said poles and wires and all other costs, damages, liability for damages, loss, injury, possibility of loss of any nature whatsoever arising from the existence, erection and maintenance of said poles and wires. That said charges are in effect a tax upon the said poles and wires upon which they are so sought to be imposed and that the said ordinances are void and of no effect, because the borough of New Hope has no authority in law to impose any license fee whatsoever, and because it has no authority in law to impose a tax thereon and because the said ordinances are in conflict with that provision of the Constitution of the United States which confers upon Congress the power to regulate commerce with foreign nations and among the several States, and because, as a police regulation, the license fees and charges sought to be imposed thereby are excessive and unreasonable.

Deponent further avers that the said defendant is subject to the laws of the Commonwealth of Pennsylvania imposing a tax upon its capital stock and upon its gross earnings within the said State, and that, in accordance therewith, it duly reports to the auditor general of said State and pays to the State treasurer all of the taxes which are imposed thereunder and thereby, being the full taxes created by the State upon the property, business and occupa-
37 tion of the said defendant owned or incurred in said State, and which said taxes amount annually to a large sum of money.

Deponent further avers that all the streets, lanes and alleys of the borough of New Hope upon which the poles and wires to recover for the license fees upon which this suit is brought are erected are post-roads of the United States. All which he avers and expects to be able to prove upon the trial of the said cause.

A. G. SAYLOR.

Sworn and subscribed to before me this 31st day of December, A. D. 1898.

[SEAL.] FRANK D. GRAHAM,
Notary Public.

Endorsement: No. 11 January term 1899. In the court of common pleas of Bucks county. The Borough of New Hope *v.* The Western Union Telegraph Co. Affidavit of defense Filed Jan'y 3rd 1899. Read & Pettit Robert M. Yardley att'ys.

Motion for Entry of a Plea.

In the Court of Common Pleas of Bucks County.

THE BOROUGH OF NEW HOPE
v.
THE WESTERN UNION TELEGRAPH COMPANY.
} No. 11, January Term, 1899. Action of Assumpsit.

March 16, 1899, plaintiff moves the entry of a plea in the above-stated case in accordance with the rule of court in such case made and provided.

WM. C. RYAN,
Att'y for Pl'ff.

Endorsement: No. 11 January term 1899 Motion for entry of plea Filed March 16th, 1899.

Action of Assumpsit.

In the Court of Common Pleas of Bucks County.

THE BOROUGH OF NEW HOPE
v.
THE WESTERN UNION TELEGRAPH COMPANY.
} No. 11, January Term, 1899. Action of Assumpsit.

March 16, 1899, plaintiff moves the entry of a plea in the above-cited case in accordance with the rule of court in such case made and provided.

BUCKS COUNTY, *ss:*

William C. Ryan being duly sworn deposes and says that he served notice of the entry of the above motion on Robert M. Yardley, Esq., attorney for the said defendant, on the sixteenth day of March, A. D. 1899, by handing him a copy thereof.

WM. C. RYAN.

Sworn and subscribed to before me this 3rd day of April, A. D. 1899.

W. F. KELLY, JR.,
Deputy Proth'y.

The prothonotary enters the plea of non-assumpsit.

W. F. KELLY, JR.

April 3rd 1899.

Endorsement: No. 11 January term 1899. The Borough of New Hope *v.* The Western Union Telegraph Company. Action of assumpsit Filed April 3rd, 1899.

Notes of Testimony.

In the Court of Common Pleas of Bucks County.

THE BOROUGH OF NEW HOPE
v.
THE WESTERN UNION TELEGRAPH COMPANY. } No. 11, Jan. Term, 1899. Assumpsit.

William C. Ryan, Esq., attorney for plaintiff.
Silas W. Pettit of Phila. and Robery M. Yardley for defendant.

40 Notes of testimony taken at Doylestown October 17, 1899.

Plaintiff opens.

Mr. Ryan, counsel for plaintiff, offers in evidence the ordinance book with the ordinance, as follows:

Borough Ordinance No. 10.

An ordinance for the regulation, introduction, and maintenance of telegraph, telephone, and electric light poles and wires into and in the borough of New Hope.

SECTION 1. Be it ordained and enacted by the town council of the borough of New Hope That before any telegraph, telephone or electric light poles shall be erected, or telegraph, telephone or electric wires shall be run along, over or under any streets, lane or alley of the borough of New Hope, permission to do so shall be first obtained from the town council by the corporation firm or individual who proposes to erect such poles and run such wires, such permission to be granted by ordinance only.

SECTION 2. That all telegraph, telephone and electric light poles now erected or to be erected hereafter in the borough of New Hope which are or shall be owned or leased by any corporation firm or individual shall be designated by the names or initials of such owners or lessees, and each of said poles shall have a distinctive number, together with the name or initials of such owner or lessees, legibly marked thereon, or before the first day of October next and annually thereafter such owner or lessee shall make applica-

41 tion to the burgess for a license to maintain the poles and wires theretofore erected for the ensuing year, specifying the poles by their designation of name or initials and number as provided by this section, and wires by the streets along, over or under which they run. The burgess shall upon the production to him by the applicant of the receipt of the borough treasurer for the license fees hereinafter provided for, issue license which shall authorize the maintenance of the poles and wires designated in the application for the period of one year from that date.

SECTION 3. That for the maintenance of each and every telegraph, telephone or electric light pole within the limits of said borough of New Hope, the owner or lessee thereof shall pay to the

borough treasurer an annual license fee of one dollar, and for the maintenance of each and every mile of telegraph, telephone and electric light wire within the limits of said borough the owner or lessee thereof shall pay to the borough treasurer for the use of said borough an annual license fee of two dollars and fifty cents.

SECTION 4. That any corporation, firm or individual who shall fail to comply with the requirements of this ordinance shall be subjected to a penalty of one hundred dollars for each and every offense to be recovered in like manner as debts for penalties of like amount are recoverable.

By order of council passed and approved July 10th, 1894.

(Signed) C. C. B. JOHN, *Burgess.*

Attest: CHARLES HAIGH, *Secretary.*

42 Published and fifteen copies posted in conspicuous places.

Attest: DAVID CUNNINGHAM, *Secretary.*

It is agreed between the parties that for the year beginning October 1, 1895 there were 75 poles and 20 miles of wire, and for the three succeeding years, beginning October 1, 1896, there were 36 poles and 12 miles of wire maintained by the defendant in said borough.

Plaintiff rests.

The following witnesses were called on behalf of defendants:

WILLIAM B. GILL, sworn.

Examined by Mr. PETTIT:

Q. Mr. Gill what is your occupation.

A. Superintendent of the Western Union Telegraph Company.

Q. Of what district?

A. Known as the sixth district of the eastern division.

Q. And covers what territory?

A. Covers the territory from Jersey City to the Potomac river and around the Potomac river to the edges of West Virginia to the Allegheny mountains, over the New York State line near Elmira.

Q. How long have you been in the telegraph business.

A. I went there a messenger boy between 1862 and 1863.

Q. And you have been connected with it ever since.

A. Yes, sir.

43 Q. Have you ever built any telegraph lines?

A. Yes, sir, I have built telegraph, telephone and trolley lines, in fact have been doing it for more than 20 years I should judge.

Q. Now you know the Western Union line in the borough of New Hope?

A. Yes, sir.

Q. At present and since 1896, some time in 1896, it was testified or agreed that there were 36 poles and 12 miles of wire in that borough.

A. That is correct.

Q. In other words there was one mile of poles and 12 miles of wire line?

A. Yes.

Q. What were those wires used for?

A. I have a memorandum taken from our records showing their assignment. They were all used for through wires. They are used in New York and Philadelphia circuits. One of them used for the congressional wire between New York and Washington. One assigned to New York and Jacksonville circuit which takes the cables to Cuba. Another assigned from New York to Europe; and several assigned from New York to Baltimore and one is assigned from New York to Philadelphia exclusively for cable business, foreign cables; and the Jacksonville circuit is used largely for cables to Cuba.

44 Q. Have you any office in the borough of New Hope?

A. We have no office that we operate ourselves. The Phila. & Reading Company take in business there and transfer to us in Philadelphia, and points on our line.

Q. And these wires—does any part of the business that goes to or goes from New Hope go over these lines of wires and poles that you have spoken of?

A. None whatever.

Q. Prior to March 1896 there was a line of 40 poles, an 8-wire line of 40 poles.

A. That was the old original line that first went through New Hope built a great many years ago. The line built which old Dr. Livezey had charge of at New Hope.

Q. For what was that line used during the year 1895 from October 1895 until it was taken down?

A. That was used as a through line also. Assigned to through circuits in the same way. It was never used as a local for 1894 when Mr. Mellin had charge of it.

Q. Now in respect to the local business, that is done by the Reading Company, as I understand it?

A. Yes, sir.

Q. Do you know what that amounts to for the borough of New Hope?

A. It averages somewheres about $7 to $7.50 a month. That is for the business of course which is handed to us at Philadel-

45 phia. They retain in between themselves.

Q. Mr. Gill do you know what it costs the Western Union Company to inspect and repair its lines of telegraph, including therein the material, the new poles, the new wires and cross-arms and fixings that are used in the repair of the line for a mile of wire in your district?

A. It costs the Western Union Telegraph Company for the inspection repairs and maintenance of its plant for the last 13 years it has averaged $1.49½ per wire per annum. Some years, for instance in 1898, it only run $1.98 per mile per wire per annum, and othe

years it runs a little higher, according to the conditions of the weather.

Q. Well, then $1.50 per mile per wire per annum does that include material?

A. Yes, sir. That is what has been for 13 years.

Q. Now what does this tax amount to for a mile of wire in the borough of New Hope, you just calculate it there, you have it at a $1 a pole and $2.50 a mile a wire.

A. It amounts to $66.

Q. $66 for 12 miles of wire that would be $5.50 per mile of wire.

A. That would be $5.50 per wire per annum.

Q. You say you have built telegraph lines, you know the line in New Hope. What is that line worth.

A. The line through New Hope?

46 Q. Yes, sir. I mean new, brand-new constructed just as it is constructed put up.

A. I can tell you the value of that line, ours as well as the other companies, because I built the other company by contract. I do not recollect the exact figures what I got for it, but that line is worth $3 a pole for the poles there, and it is worth—a man taking a contract would be very glad to take the erection of them for $2.50 per pole, so that would make $5.50 a pole put up. Now to string the wire, the contract price for stringing the wire would be $3, the telegraph Co. usually can do it for $2.50 per mile per wire, so that if there is 12 wires there that would be $30 for stringing the wires; and 36 poles at $5.50 would be $198 and that would make the line worth $228.

Q. How about the cost of the wire, did you put that in?

A. No, I did not put the cost of the wire in. The wire is worth about $12 a mile, that would make $372.

Q. And the tax claimed is $66 a year.

Cross-examined by Mr. RYAN:

Q. When you refer to what the line is worth you mean the value of the poles and wires and fittings and what not that are within the corporate limits, the materials?

A. Yes. I mean a line new like replacing the present line, its value. That is it could be replaced for that money.

47 WILLIAM CUNNINGHAM, sworn.

Examined by Mr. PETTIT:

Q. Mr. Cunningham, you are the secretary of the council of New Hope, are you not?

A. Yes, sir.

Q. And you have been how long?

A. Since October 1894.

Q. Now during that time has the borough of New Hope expended any money on account of the poles and wires of the Western Union Telegraph Company?

A. No, sir.

Q. Or of the Postal Telegraph Company there?
A. No, sir.
Q. Are there any other lines of telegraph through New Hope except those two lines the Postal and the Western Union?
A. I don't know.
Q. There is a Reading line, isn't there?
A. Yes.
Q. Does that end at New Hope or go through it?
A. To the best of my knowledge it ends at New Hope.
Q. New Hope is a borough?
A. Yes, sir.
Q. Then it has a burgess, does he have any salary?
A. No, sir.
Q. Then it has their councils?
A. Seven councilmen.
Q. Do they have any salary?
48 A. No, sir.
Q. Then it has a secretary of the board, that is yourself, I suppose they pay you?
A. Yes.
Q. They have a treasurer, do they not?
A. Yes, sir.
Q. How much salary do they pay the treasurer?
A. $20 a year. They pay the secretary $30 a year.
Q. Then there is a constable elected in the borough, isn't there?
A. Yes, sir.
Q. Does he get paid any salary by the borough?
A. No salary. He does police services during holidays. When the burgess sees fit to appoint a policeman he often calls on the constable and he gets paid for doing that.
Q. How much does he get paid for that?
A. Most of the time $2.50 a day.
Q. Now are there any other expenses of the borough government except those that you have mentioned for carrying on the government there besides the salaries of the officers?
A. That is all. The assessor is paid for his services, borough assessment.

Cross-examined by Mr. RYAN:

Q. Are the several sums named by you the only amounts that are paid for borough purposes during the year? Do you spend anything on streets?
49 A. Only what is done by the street commissioner, by the day, no regular salary.
Q. You do pay him for his services?
A. Yes.
Q. Do you ever buy material for the streets?
A. Yes, sir.
Q. What would that amount to in a year?
A. I could not say.

Q. Do you light the borough?
A. Yes.
Q. Who pays for that?
A. It is paid out of the taxes of the borough funds.
Q. How much does that cost a year?
A. $10.50 a year for a lamp, and there are 34 lamps.
Q. About what do the gross expenditures of the borough run a year, including all these amounts you have named?
A. I would have to refer to the borough statements. The minutes there tells what it is.
Q. You have already identified this book. This is the borough minute book, and what I show you is the borough statement for the year ending March 21, 1899.
A. Yes, sir.
Q. This shows disbursements on the part of the borough to what amount?
A. $4088.61.
Q. They paid some of that to a bank which they owed, 50 didn't they?
A. Yes.

The minute book, containing the borough statement, is offered in evidence.

"To the burgess and council of New Hope borough:

Your finance committee would offer the following report of receipts and disbursements for the year ending March 21st, 1899.

Receipts.

Received on 1896 duplicate	$2.75
" " 1897 "	52.40
" " 1898 "	810.73
" from Lambertville national bank	2870.38
" " burgess for fines	10.00
" " county treasurer, license fees	228.00
" " former treasurer	148.27
Total	$4122.53

Bond Account.

Received on 1896 duplicate	$.85
" " 1897 "	17.46
" " 1898 "	270.23
" from former treasurer	413.24
Total	$701.78

51 *Firemen's Relief Fund.*

Received from auditor general of Pennsylvania	$2.32
" " former treasurer	1.52
Total	$3.84

Expenses for the year were as follows:

Repairing streets	$662.37
Maintenance of poor	25.90
Street lamps	340.90
Borough assessments	20.00
Auditor's services	2.00
Physician's "	40.00
Secretary's "	30.00
Treasurer's "	20.00
Overseer of poor services	10.00
Police services	4.00
Attorney's services	64.00
Removing garbage	70.00
Incidental expenses	25.36
Expanding tools for Eagle Fire Company	10.35
Cleaning and repairing town hall	34.23
Printing for board of health	29.50
Total	$1388.61

Disbursements.

Amount paid on borough orders	$1388.61
" " Lambertville national bank	2700.00
	$4088.61

52 *Bond Account.*

Amount paid—interest on bonds	$126.00
" " bonds redeemed Nos. 16, 17, 18, 19	400.00
" " State tax on bonds	10.40
	$536.40

Assets of Borough.

Uncollected on 1897 duplicate	$23.58
" " 1898 "	201.08
Balance in treasurer's hands, borough purposes	33.92
" " " " on bond account	165.38
Firemen's relief fund	3.84
	$427.80

Indebtedness of Borough.

Bonds unpaid	$2600.00
Lambertville national bank, notes	800.00
Total	$3400.00

Respectfully submitted.

R. C. FOULKE,
T. N. RYAN
CHARLES ROBERTS,
Finance Committee."

THOMAS O'ROURKE sworn.

Examined by Mr. PETTIT:

Q. What is your occupation?
A. Lineman.
Q. For what company?
53 A. Postal.
Q. Where are you stationed?
A. New Hope, Pa.
Q. What lines of telegraph are there in New Hope?
A. Western Union and Postal.
Q. How about the Reading?
A. And the Reading, that comes in on the railroad.
Q. Does it end at New Hope or go on beyond it?
A. Ends at New Hope.
Q. Then it has no poles or wires on streets?
A. No, sir.
Q. How long have you been lineman of the Postal Telegraph Company there?
A. Since 1882.
Q. You are familiar with the position and location of all the telegraph poles and wires in the borough are you not?
A. Yes, sir.
Q. During all that time did the borough ever do anything in the way of inspecting or repairing or removing or anything else in connection with the poles and wires of those telegraph companies?
A. Not to my knowledge.

Cross-examined.

No questions.

Mr. Pettit, of counsel for defendant, offers in evidence the certified copy of the charter of the Western Union Telegraph
54 Company granted by the laws of the State of New York; and especially the act of April 4th, 1856 changing the name to the Western Union Telegraph Company. Also, the certificate of the then Postmaster General of the United States dated June 30, 1884 that the Western Union Telegraph Company had accepted the provisions of the act of Congress entitled An act to aid in the construction of telegraph lines and to secure to the Government the use of the same for postal, military and other purposes, approved July 24, 1866.

Mr. Pettit, on behalf of defendant, asks that the plaintiff admit that the annual license fee imposed upon the Postal telegraph by the borough of New Hope amounts to $138 a year.

Mr. Ryan, counsel for plaintiff, objects on the ground that it is irrelevant. The objection is sustained, to which ruling of the court the defendant excepts.

Both sides close.

Charge to Jury by Judge Yerkes.

GENTLEMEN OF THE JURY: This is a case wherein The Borough of New Hope, a municipal corporation of this county, has sued The Western Union Telegraph Company to recover a sum of money levied as a license upon its poles and wires within the borough of New Hope. A municipal corporation such as is the borough of New Hope has a right under the law to impose a license for the privileges conferred or exercised within its boundaries, as a
55 regulation of its police system; that is, for the purposes of maintaining good order, peace and the protection of the lives and property of its citizens, and the safety of persons travelling through its streets. A license regulation must, however, have its limits. It cannot be carried to the extent of being oppressive, excessive and unreasonable upon the subject with which it treats. If it does it is void and may be set aside and disregarded. It has been held to be the law that in the matter of a license as a police regulation it must be limited to the necessary expense of granting the license, of regulating the subject-matter of it, and of the danger or liability which may arise as a consequence of its existence. For instance, our supreme court has said that in the case of these poles it is the duty of the borough to provide against their falling down, against injury which may arise from them as a consequence of their erection, and the probable and reasonable expense and liability to which the municipality may be subjected, not in one year, but on any occasion, so near as it can be approximated is the proper basis for a license fee or police regulation. But beyond that the municipality cannot go; because then it is not levying the tax or payment, the collection of which is merely for the purposes of regulating and maintaining a police supervision but it is taking the property of another not liable to taxation for public use; outside of the duty imposed upon every person or corporation who goes into a municipality to be held liable, rea-
56 sonably liable, for the consequences of their occupation of its streets. It has been said by one of the judges of our supreme court that there is no power to take the money or property of another for public purposes, excepting it be that of taxation or of eminent domain. And under our laws the power to tax a corporation such as this telegraph line is, as a matter of revenue, does not exist, but is confined to that of a license, as I have defined it to you.

The question which arises in this case it is said is more properly one for the court, and would be exclusively for the court if it came here upon evidence asserted through an affidavit of defense, or of a documentary character. But the court proposes in this case to submit to you the question whether under these rules and regulations the amount of license fee imposed here is reasonable and proper; whether it exceeds under all the circumstances what may be the necessary, the probable, or the expectant liability and expense of the borough of New Hope for the issuing

of these licenses regulating the location of these lines and poles, seeing to their safe maintenance so as to protect the public and its citizens from injury, and to render them safe and free from being a nuisance upon the streets. If it is a reasonable charge for such purpose and can be justified upon that ground, then this ordinance can be enforced and the plaintiff can recover; but if it is unreasonable, unjustifiable by the facts of the case, it cannot be, and I do
57 not understand why that should be a question exclusively for the court, more properly than one partly of fact for the jury. If the charge is unwarranted, if it is arbitrary, if it is an exaction in the shape of a tax for the purpose of collecting money for the revenue of the borough in other respects and to maintain its government outside of the regulation of the property of this defendant, then it is illegal and cannot be collected.

Now then, gentlemen, we submit this question to you, and as you shall find, your verdict will be for the plaintiff or defendant. The amounts in dispute here, the amount claimed, is embodied in a statement made by the counsel, but does not establish that this is a reasonable charge or license, it only establishes that that is the claim.

The following points have been submitted to me:

1. It appears from the uncontradicted evidence in this case that the poles and wires in the borough of New Hope to recover for the charges upon which this suit is brought form a part of the system of poles and wires of the defendant company extending into and through the other States and Territories of the United States, over and along the system of poles and wires (including therein the said poles and wires in the borough of New Hope) communication by electricity is carried on and messages transmitted by said defendant company to and from citizens from other States, and to and from such citizens of other States from and to citizens of the State of
58 Pennsylvania, which said business is commerce between the States within the meaning of the Constitution of the United States; therefore the borough of New Hope has no right to impose any charge for the privilege of erecting and maintaining said poles and wires in said borough except only such sum as will reasonably cover and reimburse to it the expense to which it may be subjected in consequence of the erection and maintenance of said poles and wires, and if the license fees sued for in this case exceed said sum your verdict should be for the defendant.

Affirmed.

2. It appears from the uncontradicted evidence in this case that no costs or expenses are imposed upon the borough of New Hope in consequence of the erection and maintenance of the poles and wires of the defendant company, and as said borough is without power to exact any charge for the maintenance of said telegraph poles and wires the ordinance of the said borough of July 10th, 1894, sued on in this case is void and the verdict of the jury should be for the defendant.

Refused.

3. Evidence in this case shows that the amount of license fee sought to be imposed upon the defendant is excessive in amount

and the ordinance of the plaintiff is therefore illegal and void, and the verdict must be for the defendant.

Refused.

4. Under the evidence in this case the verdict of the jury should be for the defendant.

59 Refused.

October 17, 1899, before verdict the defendant excepts to the answers to points of law and the charge of the court and requests that the same may be reduced to writing and filed, and that a bill be sealed which is now done.

HARMAN YERKES,
President Judge. [SEAL.]

Endorsement: In the court of common pleas of Bucks county. The Borough of New Hope *v.* The Western Union Telegraph Company. No. 11 Jan. T. 1899. Assumpsit. Notes of testimony Filed October 27, 1899.

Motion and Reasons for New Trial.

In the Court of Common Pleas of Bucks County.

THE BOROUGH OF NEW HOPE
v.
THE WESTERN UNION TELEGRAPH COMPANY.
No. 11, January Term, 1899.
Assumpsit.

Now October 19, 1899 the defendant by its attorney- Read and Pettit and Robert M. Yardley respectfully move- the court for a new trial in the above-stated case, and assign- the following reasons therefor:

60 1st. The court erred in not instructing the jury as requested by the defendant in its first written point submitted to the court for instruction.

2nd. The court erred in not instructing the jury as requested by the defendant in its second written point submitted to the court for instruction.

3rd. The court erred in not instructing the jury as requested by the defendant in its third written point submitted to the court for instruction.

4th. The court erred in not instructing the jury as requested by the defendant in the fourth written point submitted to the court for instruction.

ROBERT M. YARDLEY,
Att'y for Defendant.

Endorsement: No. 11 January term 1899. The Borough of New Hope *v.* The Western Union Telegraph Company. Motion and reasons for new trial. Filed October 19, 1899. Read and Pettit. Robert M. Yardley.

Opinion of the Court.

In the Court of Common Pleas of Bucks County.

THE BOROUGH OF NEW HOPE *v.* THE WESTERN UNION TELEGRAPH Company.	No. 11, Jan. T., 1899. Action of Assumpsit.

61 Sur motion and rule for a new trial.

Opinion of the Court.

The plaintiff, through ordinance regularly adopted, imposed a license fee upon the defendant of one dollar for each pole erected within the borough limits, and of two dollars and fifty cents for each mile of wire maintained therein. The affidavit of defense embraced the usual question of reasonableness of the license, and the right of plaintiff to interfere with interstate commerce, by taxation of the business of a corporation engaged in the same.

There was no motion for judgment for want of a sufficient affidavit of defense. After the cause was at issue it came regularly upon the trial list, and a jury was impanelled to try it. The result was a verdict for plaintiff. Several requests were presented to the court, by the defendant, all of which, excepting the first, asked for binding instructions to return a verdict in favor of defendant on the ground that the ordinance was unreasonable and oppressive.

We asked the jury to pass upon the question of the unreasonableness of the license fee, upon the facts as applied to what we considered a fair definition of what constitutes a license and the power to impose the same.

It is intimated that we were inconsistent, in submitting to the jury a question which it is the province of the court to determine.

To a degree this is true, though the wisdom of the rule that
62 the question of the unreasonableness of a borough ordinance in cases of this character, should not be submitted to the jury under proper instructions, may well be doubted.

But the defendant has no ground to complain, provided the court reserves to itself to finally determine the question, and does so before the judgment becomes conclusive. By the first point which was affirmed, the court was asked to submit the question to the jury, with the result that they found for the plaintiff. Under the rule of law as adopted by the courts, notwithstanding any conclusion the jury may have reached, the court, whether exercising its usual power to review a mistaken action of the jury or to determine the question for itself, must now pass upon the validity of the ordinance and, if we conclude binding instructions as prayed for should have been given, must grant a new trial. If on the other hand the instructions should have been in favor of plaintiff, the defendant cannot complain that the question was given to the jury.

In determining this point the exercise of our discretion and judgment cannot be individual, but must be judicial, and be governed by the opinions of our superiors. I may individually consider the rate of license exorbitant, and robbery under the forms of law, but respect for the law compels acquiescence to the *stare decisis* of the higher courts.

The determination of the reasonableness of the amount of the license tax lies, in the first instance, in the discretion of the
63 borough council. The court cannot determine whether the amount is reasonable, but rather whether it is so unreasonable as to show an abuse of discretion by the borough council. W. U. T. Co. 148 Pa. 117. North Braddock Borough *v.* Traction Co., 8 Pa. Superior Ct. 233. North Braddock Borough *v.* Telegraph Co., 11 Superior Ct. 24. Kittanning Light Heat & Power Co., *ibid.* 31.

Under facts scarcely distinguishable from those now being considered the supreme court and superior court have declared, that, a similar amount of license fee, and one equally disproportionate as this to the expenses incurred, in maintaining the police regulations, is not an unreasonable exercise of discretion by the borough authorities. In the two last cases, reported in 11 Superior Court Reports, the fee was precisely the same for poles and wires as here, and in both, the superior court refused to find an abuse of discretion. While the facts are not precisely alike, we fail to find such a difference as would warrant us in flying into the teeth of those cases. We are in duty bound to follow precedents. If this be a case such as in Braddock Borough *v.* Telegraph Company, Judge Porter says demonstrates an abuse of discretion, it is proper that the superior court should be the first to so declare, in view of the unanimity of prior decisions.

And now, to wit, February 26, 1900, the rule for a new trial is discharged and judgment for plaintiff.

By the court.

HARMAN YERKES,
President Judge.

64 Endorsement: In the court of common pleas of Bucks county. The Borough of New Hope *v.* The Western Union Telegraph Company. No. 11 Jan. T. 1899. Action of assumpsit. Sur motion and rule for a new trial. Opinion of the court. Filed Feb'y 26th, 1900.

Rule on the Appellee to Appear and Plead on the Return Day of the Writ.

The Superior Court of Pennsylvania, Sitting at Philadelphia, *ss:*

[SEAL.]

The Commonwealth of Pennsylvania to the justices of the court of common pleas for the county of Bucks, Greeting:

We being willing for certain causes, to be certified of the matter of the appeal of the Western Union Telegraph Company from the judgment in No. 11 January term 1899 wherein The Borough of New Hope was plaintiff and the said appellant was defendant before you, or some of you, defending, do command you, that the record and proceedings aforesaid, with all things touching the same, before the justices of our superior court of Pennsylvania, at a superior court to be holden at Philadelphia, the third Monday of November next, so full and entire as in our court before you they remain, you certify and send, together with this writ, that we may further cause to be done thereupon that which of right and according to the laws of the said State ought.

65 Witness the Honorable Charles E. Rice, doctor of laws, president judge of our said superior court at Philadelphia, the 24th day of April in the year of our Lord one thousand nine hundred.

CHAS. S. GREENE,
Prothonotary.

I certify that William B. Gill, of the city of Philadelphia is surety in the within case, in the sum of eight hundred dollars.

EMIL W. HARING,
[SEAL.] *Prothonotary.*

To the honorable the judges of the superior court of the Commonwealth of Pennsylvania, sitting at Philadelphia:

The record and process, and all things touching the same, so full and entire as before us they remain, we certify and send, as within we are commanded.

HARMAN YERKES, [L. S.]
Pres't Judge.

Endorsement: 11 Jan'y term 1899 C. P. Bucks. No. 101 October term 1900. Superior court. The Borough of New Hope *v.* The Western Union Telegraph Company, appellant. Certiorari to the court of common pleas for the county of Bucks. Returnable the third Monday of November, 1900. Rule on the appellee to appear and plead on the return day of the writ. Received and filed April 26th, 1900. Filed Jul- 26, 1900. In the superior court. Robert M. Yardley, Read & Pettit.

66 *Assignments of Error.*

Superior Court, October Term, 1900.

THE BOROUGH OF NEW HOPE
v.
WESTERN UNION TELEGRAPH CO., Appellant. } No. 101.

And now, to wit, this twenty-eighth day of September, A. D. 1900, the appellant files its assignments of error in the above cause and assigns as error therein the following to wit:

I. The learned judge who tried the cause erred in charging the jury as follows:

"A municipal corporation, such as is the borough of New Hope, has a right under the law to impose a license for the privileges conferred or exercised within its boundaries as a regulation of its police system; that is for the purpose of maintaining good order, peace and the protection of the lives and property of its citizens, and the safety of persons travelling through its streets."

II. The learned judge who tried the cause erred in charging the jury as follows:

"It has been held to be the law that in the matter of a license as a police regulation it must be limited to the necessary expense of granting the license, of regulating the subject-matter of it and of the danger or liability which may arise as a consequence of its existence."

67 III. The learned judge who tried the cause erred in charging the jury as follows:

"For instance, our supreme court has said, that in the case of these poles, it is the duty of the borough to provide against their falling down, against injury which may arise from them as a consequence of their erection and the probable and reasonable expense and liability to which the municipality may be subjected, not in any one year, but on any occasion so near as it can be approximated, is the proper basis for a license fee or police regulation."

IV. That the learned judge who tried the cause erred in charging the jury as follows:

"But the court proposes in this case to submit to you the question, whether under these rules and regulations the amount of license fee imposed here is reasonable and proper; whether it exceeds under all the circumstances what may be the necessary, the probable or the expectant liability and expense of the borough of New Hope, for the issuing of these licenses, regulating the location of these lines and poles; seeing to their safe maintenance, so as to protect the public and its citizens from injury and to render them safe and free from being a nuisance upon their streets. If it is a reasonable charge for such purpose and can be justified upon that ground, then this ordinance can be enforced and the plaintiff can recover; but if it is unreasonable, unjustifiable by the facts of the case,

68 it cannot be and I do not understand why that should be a

question exclusively for the court more properly than one partly of fact for the jury."

V. That the learned judge who tried the cause erred in refusing the second point submitted by the said defendant, which said second point was as follows:

"It appears from the uncontradicted evidence in this case that no costs or expenses are imposed upon the borough of New Hope in consequence of the erection and maintenance of the poles and wires of the defendant company, and as said borough is without power to exact any charge for the maintenance of said telegraph poles and wires, the ordinance of the said borough of July 10, 1894, sued on in this cause, is void, and the verdict of the jury should be for the defendant."

The answer to the said point being as follows:

"Refused."

VI. That the learned judge who tried the cause erred in refusing the third point submitted by the said defendant, which said third point was as follows:

"The evidence in this case shows that the amount of license fee sought to be imposed upon defendant is excessive in amount and the ordinance of the plaintiff is therefore illegal and void and the verdict must be for the defendant."

The answer to the said point being as follows:

"Refused."

69 VII. That the learned judge who tried the cause erred in refusing the fourth point submitted by the said defendant, which said point was as follows:

"Under the evidence in this case the verdict of the jury should be for the defendant."

The answer of the learned judge thereto being as follows:

"Refused."

READ & PETTIT,
Att'ys for Appellant.

Endorsement: Superior court October term 1900. No. 101. The Borough of New Hope *v.* Western Union Telegraph Company, appellant. Assignments of error. Siled Sep. 27, 1900. In the superior court. Read & Pettit.

Opinion of the Superior Court of Pennsylvania.

BOROUGH OF NEW HOPE *v.* WESTERN UNION TELEGRAPH CO. } No. 101, Oct. Term, 1900. Appeal from Judgment of C. P. of Bucks Co.

Filed Feb. 14, 1901.

Per Curiam:

70 It has been decided, first, that the adoption by a city of an ordinance imposing a reasonable annual license fee for each pole and each mile of suspended wire erected and main-

tained by telegraph, telephone and electric light companies within city limits is a valid exercise of police power; second, that boroughs have equal powers with cities in that regard; third, that such ordinance is not, as to telegraph companies engaged in the business of transmitting messages between the several States of the Union, in violation of the commerce clause of the Federal Constitution; fourth, that in an action to recover the license fee for a particular year, the same being payable at the beginning of the year, the fact that the borough or city did not expend money for inspection, supervision, or police surveillance of the poles and wires in that year is not a defense; fifth, that the courts will not declare such ordinance void because of the alleged unreasonableness of the fee charged unless the unreasonableness be so clearly apparent as to demonstrate an abuse of discretion on the part of the municipal authorities: W. U. Tel. Co. *v.* Philadelphia, 22 W. N. C. 39; S. C. 11 Cent. Rep. 102; Allentown *v.* W. U. Tel. Co., 148 Pa. 117; Chester *v.* P. T. & P. Tel. Co., 148 Pa. 120; Chester *v.* W. U. Tel. Co., 154 Pa. 466; Philadelphia *v.* Am. Union Tel. Co., 167 Pa. 406; Ridley Park *v.* Citizens' Electric Light & Power Co., 9 Pa. Superior Ct. 615; Lansdowne *v.* Same, 9 Pa. Superior Ct. 620; North Braddock *v.* Central etc. Tel. Co., 11 Pa. Superior Ct. 24; Kittanning Electric Light Co. *v.* Kittanning, 11 Pa. Superior Ct. 31. See also McKeesport
71 *v.* McKeesport, etc. R'y Co., 2 Pa. Superior Ct. 242; North Braddock *v* Second Av. Tr. Co., 8 Pa. Superior Ct. 233; Lansdowne *v.* Delaware, etc., Electric R'y Co., 9 Pa. Superior Ct. 621, and Taylor *v.* C. P. Tel., etc. Co., 8 Pa. Dist. Rep. 92.

In many of the foregoing cases the license fee was the same as that imposed by the ordinance under consideration. In none of the cases was the ordinance declared void for unreasonableness, although it was inferentially conceded that a case might arise where the license fee would be so grossly disproportioned to the burden imposed upon the municipality in consequence of the erection and maintenance of the poles and wires as to warrant the court in presuming that the ordinance was a revenue measure, not a police regulation. None of the cases lays down a fixed and invariable rule by which that question is to be determined, but after a comparison of the facts developed on the trial of this case, with the facts of some of the cases above cited, we have been led by the conclusion that the court would not have been justified by the precedents in declaring the ordinance void. The facts being undisputed, we take it that the question of the validity of the ordinance was for the court to decide. But, if on the undisputed facts, the court would not have been warranted in declaring the ordinance void, the submission of the question of the reasonableness of the fee to the jury was an error of which the defendant has no just cause to complain.

Judgment affirmed.

72 UNITED STATES OF AMERICA, } ss:
State of Pennsylvania, }

I, Charles S. Greene, prothonotary of the superior court of Pennsylvania, sitting at Philadelphia, do hereby certify that the foregoing record, pages 1 to 72 inclusive is a true and faithful copy of the record and proceedings of the superior court of the State of Pennsylvania, sitting at Philadelphia, in a certain suit therein pending wherein The Western Union Telegraph Company was appellant, and The Borough of New Hope was appellee.

Seal of the Superior Court of Pennsylvania.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said superior court of the State of Pennsylvania, sitting at Philadelphia, at Philadelphia, the 17th day of May, 1901, and in the one hundred and twenty-fifth year of the Independence of the United States.

CHAS. S. GREENE,
Prothonotary of the Superior Court of Pennsylvania, Sitting at Philadelphia.

{ Ten-cent U. S. internal revenue stamp, canceled 5, 17, 1901. C. S. G. }

73 I, Charles E. Rice president judge of the superior court of Pennsylvania, do hereby certify, that Charles S. Greene was, at the time of signing the annexed attestation, and now is, prothonotary of the said superior court of Pennsylvania, sitting at Philadelphia, to whose acts, as such, full faith and credit are and ought to be given; and that the said attestation is in due form.

In witness whereof, I have hereunto subscribed my name this 17th day of May one thousand nine hundred and one.

CHARLES E. RICE,
Pres'd't Judge.

I, Charles S. Greene, prothonotary of the superior court of Pennsylvania, sitting at Philadelphia, do certify, that the Honorable Charles E. Rice by whom the foregoing certificate was made and given, was, at the time of making and giving the same, and is now, president judge of the superior court of Pennsylvania; to whose acts, as such, full faith and credit are and ought to be given, as well in courts of judicature as elsewhere; and that his signature, thereto subscribed, is genuine.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said superior court of Pennsylvania, sitting at Philadelphia, this 17th day of May one thousand nine hundred and one.

[Seal of the Superior Court of Pennsylvania.]

CHAS. S. GREENE.

{ Ten-cent U. S. internal revenue stamp, canceled 5, 17, 1901. C. S. G. }

74 Supreme Court of United States, October Term, 1901.

THE WESTERN UNION TELEGRAPH COMPANY, Plaintiff in Error,
vs.
THE BOROUGH OF NEW HOPE, Defendant in Error. } No. —.

And now, to wit, this 13th day of May 1901, the plaintiff in error files its assignments of error in the above cause, and assigns for error as follows:

I. The learned judge who tried the cause erred in charging the jury as follows:—

"A municipal corporation, such as is the Borough of New Hope, has a right under the law to impose a license for the privileges conferred or exercised within its boundaries as a regulation of its police system; that is for the purposes of maintaining good order, peace and the protection of the lives and property of its citizens, and the safety of persons traveling through its streets."

II. The learned judge who tried the cause erred in charging the jury as follows:—

"It has been held to be the law that in the matter of a license as a police regulation it must be limited to the necessary expense of granting the license, of regulating the subject-matter of it, and of the danger or liability which may arise as a consequence of its existence."

III. The learned judge who tried the cause erred in charging the jury as follows:—

"For instance, our supreme court has said, that in the case of these poles, it is the duty of the borough to provide against their falling down, against injury which may arise from them as a consequence of their erection and the probable and reasonable expense and liability to which the municipality may be subjected, not in any one year, but on any occasion so near as it can be approximated is the proper basis for a license fee or police regulation."

IV. That the learned judge who tried the cause erred in charging the jury as follows:—

75 "But the court proposes in this case to submit to you the question, whether under these rules and regulations the amount of license fee imposed here is reasonable and proper, whether it exceeds under all the circumstances what may be the necessary the probable, or the expectant liability and expense of the borough of New Hope for the issuing of these licenses, regulating the location of these lines, and poles; seeing to their safe maintenance, so as to protect the public and its citizens from injury and to render them safe and free from being a nuisance upon their streets. If it is a reasonable charge for such purpose and can be justified upon that ground, then this ordinance can be enforced and the plaintiff can recover; but if it is unreasonable, unjustifiable by the facts of the case, it cannot be and I do not understand why that should be a question exclusively for the court more properly than one partly of fact for the jury."

V. That the learned judge who tried the cause erred in refusing the second point submitted by the said defendant, which said second point was as follows:—

"It appears from the uncontradicted evidence in this case that no costs or expenses are imposed upon the borough of New Hope in consequence of the erection and maintenance of the poles and wires of the defendant company, and as said borough is without power to exact any charge for the maintenance of said telegraph poles and wires, the ordinance of the said borough of July 10th, 1894, sued on in this cause, is void, and the verdict of the jury should be for the defendant."

The answer to the said point being as follows:—

"Refused."

VI. That the learned judge who tried the cause erred in refusing the third point submitted by the said defendant, which said third point was as follows:—

"The evidence in this case shows that the amount of license fee sought to be imposed upon defendant is excessive in amount, and the ordinance of the plaintiff is therefore illegal and void, and the verdict must be for the defendant."

The answer to the said point being as follows:—

"Refused."

VII. That the learned judge who tried the cause erred in refusing the fourth point submitted by the said defendant, which said point was as follows:—

"Under the evidence in this case the verdict of the jury should be for the defendant."

The answer of the learned judge thereto being as follows:—

"Refused."

76 VIII. The learned superior court of Pennsylvania erred in ruling as follows:

"It has been decided, first, that the adoption by a city of an ordinance imposing a reasonable annual license fee for each pole and each mile of suspended wire erected and maintained by telegraph, telephone and electric light companies within city limits, is a valid exercise of police power; second, that boroughs have equal powers with cities in that regard; third, that such ordinance is not, as to telegraph companies engaged in the business of transmitting messages between the several States of the Union, in violation of the commerce clause of the Federal Constitution; fourth, that in an action to recover the license fee for a particular year, the same being payable at the beginning of the year, the fact that the borough or city did not expend money for inspection, supervision or police surveillance of the poles and wires in that year, is not a defense; fifth, that the courts will not declare such ordinance void because of the alleged unreasonableness of the fee charged, unless the unreasonableness be so clearly apparent as to demonstrate an abuse of discretion on the part of the municipal authorities."

IX. That the learned superior court of Pennsylvania erred in ruling as follows:

"In many of the foregoing cases the license fee was the same as

that imposed by the ordinance under consideration. In none of the cases was the ordinance declared void for unreasonableness, although it was inferentially conceded that a case might arise where the license fee would be so grossly disproportioned to the burden imposed upon the municipality in consequence of the erection and maintenance of the poles and wires as to warrant the court in presuming that the ordinance was a revenue measure, not a police regulation. None of the cases lays down a fixed and invariable rule by which that question is to be determined, but after a comparison of the facts developed on the trial of this case, with the facts of some of the cases above cited, we have been led by the conclusion that the court would not have been justified by the precedents in declaring the ordinance void."

JOHN R. READ,
SILAS W. PETTIT,
H. B. GILL,
Attorneys for Western Union Telegraph Company,
Plaintiff in Error.

77 [Endorsed:] Supreme Court of the United States October term 1901 No. — The Western Union Telegraph Company plaintiff in error *vs.* The Borough of New Hope defendant in error Assignments of error. John R. Read. Silas W. Pettit. H. B. Gill.

Endorsed on cover: File No. 18,173. Pennsylvania superior court. Term No. 101. The Western Union Telegraph Company, plaintiff in error *vs.* The Borough of New Hope. Filed May 20th, 1901.

No. 101.

No. 101. October Term, 1902.

Office Supreme Court U.S.
FILED
DEC 2 1902
JAMES H. McKENNEY,
Clerk.

Br. of Gill, Pettit & Yardley for P.C.

Supreme Court of the United States.

Filed Dec. 2, 1902.

Western Union Telegraph Company, Plaintiff in Error,

against

The Borough of New Hope, Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR.

H. B. GILL,
ROBERT M. YARDLEY,
SILAS W. PETTIT,
For Plaintiff in Error.

GEO. H. FEARONS,
BROWN & WELLS,
Of Counsel.

Allen, Lane & Scott, Print., Phila.

IN THE SUPREME COURT OF THE UNITED STATES.

Western Union Telegraph Company, Plaintiff in Error,

vs.

The Borough of New Hope, Defendant in Error.

October Term, 1902.

No. 101.

BRIEF OF PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

This is an appeal from the judgment of the Superior Court of Pennsylvania. The facts involved are very simple. By ordinance of 1894 the Borough of New Hope imposed an annual license fee of one dollar per pole and two dollars and a half per mile of wire upon the telegraph, telephone, and electric light poles and wires within its limits.

The Western Union Telegraph Company had constructed, and for a long time prior thereto and since has maintained and operated a line of about one mile of telegraph poles and wires through said Borough, and this suit was brought in the Court of Common Pleas of Bucks County to recover said license tax for the four years 1895-1898, both inclusive.

There was no evidence whatever in support of the reasonableness of the license fee charged and sued for, except only the inference held to arise from the adoption of the ordinance itself imposing the same, nor was there any evidence, or even allegation, of any expense to which the Borough might in the future be expected to be put in respect thereto.

There was affirmative and uncontradicted evidence that the line of telegraph poles and wires for the maintenance of which the charge sued for was imposed, was used exclusively for interstate and international business; that in fact the company had no local office in New Hope, but that the Philadelphia and Reading Railroad Company's telegraph handled the business of New Hope and delivered it to the Western Union at Philadelphia, and that the gross receipts of this business averaged from seven dollars per month to seven dollars and fifty cents per month. (Record, page 22.)

It will thus be seen that the gross receipts of the business in New Hope were from eighty-four dollars to ninety dollars a year, while the tax amounted to sixty-six dollars a year—say seventy-five per cent. of the gross receipts if the Western Union Company had had the business.

It was further shown that the cost value of the line taxed was about $372, while the annual license tax was sixty-six dollars, or about eighteen per cent. of the full value of the property. (Record, page 23.)

It was further shown that the total cost to the Western Union Company of inspecting and repairing its lines of telegraph, including therein the new poles, new wires, cross arms, fixtures, and material used in such repair per mile of wire per annum, was for thirteen years, an average of one dollar and forty-nine and one-half cents, as against which the amount of the license charged in this case was five dollars and fifty cents per mile of wire per annum, or about three hundred and seventy-five per cent. of the cost of the maintenance and repair thereof, which necessarily included therein the inspection thereof.

And furthermore, it was shown that the Borough employed no policemen to aid in this police regulation, but that on holidays, when the burgess saw fit to appoint a policeman, he often called on the constable, for which he was generally paid two dollars and fifty-cents a day, and in the record of the expenses of the Borough for one year, which was given in evidence, the item appears, "Police service, $4.00." (Record, pages 24-26.)

And furthermore, it was shown by the secretary of the Council of New Hope, that during all the years for which the license tax was charged, the Borough of New Hope had expended no money on account of the poles and wires of the telegraph companies (Record, page 23), and by a lineman stationed at New Hope, that during all the years involved the Borough had never done anything "in the way of inspecting, repairing, removing, or anything else in connection with the poles and wires of those telegraph companies." (Record, page 27.) The uncontradicted evidence in the case, therefore, established that there was no justification in law whatever for the imposition of the pole and wire license tax sued for in this case, except only that as the Borough chose to impose it and the court held it was presumed to be right.

The court declined the request of the telegraph company to instruct the jury to find for it, but left it to them to decide—

> "Whether it (the license tax sued for) exceeds, under all the circumstances what may be the necessary, the probable or the expectant liability and expense of the Borough of New Hope for the issuing of these licenses, regulating the location of these lines and poles, seeing to their safe maintenance, so as to protect the public and its citizens from injury, and to render them safe and free from being a nuisance upon the streets. If it is a reasonable charge for such purpose and can be justified upon that ground, then this ordinance can be enforced and the plaintiff can recover; but if it is unreasonable, unjustifiable by the facts of the case, it cannot be; and I do not understand why that should be a question exclusively for the court, more properly than one partly of fact for the jury." (Record, pages 28, 29.)

The verdict was, of course, for the plaintiff, and upon error to the Superior Court that court held that the decisions of the Supreme Court of Pennsylvania established the law in that State in respect to license fees on telegraph poles and wires to be that the same is a valid exercise of the police power.

Third.—That such ordinance is not, as to telegraph companies engaged in the business of transmitting messages between the several States of the Union, in violation of the commerce clause of the Federal Constitution.

"*Fourth.*—That in an action to recover the license fee for a particular year, the same being payable at the beginning of the year, the fact that the borough or city did not expend money for inspection, supervision, or police surveillance of the poles and wires in that year is not a defense.

"*Fifth.*—That the courts will not declare such ordinance void because of the alleged unreasonableness of the fee charged, unless the unreasonableness be so clearly apparent as to demonstrate an abuse of discretion on the part of the municipal authorities. * * * The facts being undisputed, we take it that the question of the validity of the ordinance was for the court to decide." (Record, page 5.)

ARGUMENT.

I.

The Superior Court of Pennsylvania has jurisdiction of, and its judgment is final in, *inter alia*, all actions in the Common Pleas where the value really in controversy is not greater than $1500, exclusive of costs.

Act of May 5th, 1899, section 1, P. L., 248.

In respect to appeals from the Superior Court to the Supreme Court, it is unnecessary to discuss the phraseology of the Act, as the practice is now settled that a *certiorari* will not issue unless allowed by the Supreme Court itself or one of the judges thereof.

Platt-Barber Co. *vs.* Groves, 193 Pa., 476;
Boyle's License, 190 Pa., 577-580;
In re Melon Street, 182 Pa., 397;
Kraemer *vs.* The Guarantee Trust Co., 173 Pa., 416.

SPECIFICATIONS OF ERROR.

The whole question involved in the case is raised by the following specifications of error, which appear in the record in full at pages 38 and 39, to wit:—

"VII. That the learned judge who tried the cause erred in refusing the fourth point submitted by the said defendant, which said point was as follows:—

"'Under the evidence in this case the verdict of the jury should be for the defendant.'"

The answer of the learned judge thereto being as follows:—

"Refused."

"VIII. The learned Superior Court of Pennsylvania erred in ruling as follows:—

"'It has been decided, first, that the adoption by a city of an ordinance imposing a reasonable annual license fee for each pole and each mile of suspended wire erected and maintained by telegraph, telephone, and electric light companies within city limits, is a valid exercise of police power; second, that boroughs have equal powers with cities in that regard; third, that such ordinance is not, as to telegraph companies engaged in the business of transmitting messages between the several States of the Union, in violation of the commerce clause of the Federal Constitution; fourth, that in an action to recover the license fee for a particular year, the same being payable at the beginning of the year, the fact that the borough or city did not expend money for inspection, supervision, or police surveillance of the poles and wires in that year, is not a defense; fifth, that the court will not declare such ordinance void because of the alleged unreasonableness of the fee charged, unless the unreasonableness be so clearly apparent as to demonstrate an abuse of discretion on the part of the municipal authorities.'"

The record shows that the plaintiff in error here petitioned the Supreme Court for the allowance of an appeal from the judgment of the Superior Court in this case, and that such appeal was refused. (Record, page 9.)

It therefore appears in this case that a petition for an appeal having been presented to the Supreme Court of the State and denied by it, that court thus by its own action prevented a review by it of the judgment of the Superior Court; and the judgment of the said last-named court has therefore become the judgment of the highest court of the State in which a decision in this suit can be had, and it follows, therefore, that this court may re-examine the same on writ of error, under the provisions of Revised Statutes, section 709.

Gregory *vs.* McVeigh, 23 Wall., 294;
Polleys *vs.* The Black River Co., 113 U. S., 81;
Fisher *vs.* Perkins, 122 U. S., 522;
Stanley *vs.* Schwalby, 162 U. S., 255;
Bacon *vs.* Texas, 163 U. S., 207.

II.

The plaintiff in error concedes that the Superior Court correctly states the result of the decisions of the Supreme Court of Pennsylvania.

The city of Allentown imposed a license tax of one dollar per annum per telegraph pole and brought suit against the Western Union Telegraph Company to recover same. The court charged, *inter alia*, that "*the expense of inspecting the poles during the years in question amounts to nothing, and at the furthercst it involved only the attention of the police officers for one or two days, and that these officers served at the rate of forty dollars a month,*" but further added that the city had power to impose the tax and that if the jury found that the poles were maintained as alleged then to find for the plaintiff.

Upon error the Supreme Court of Pennsylvania held that the only question was, Whether the license tax was reasonable; that the amount thereof rests with the councils in the first instance, and that

"We cannot say that this discretion has been abused in this instance or that the license fee is unreasonable."

Allentown *vs.* West. Un. Tel. Co., 148 Pa., 117.

Seemingly, therefore, because the amount of the charge in that instance was only seventy-five dollars per annum, the court held that it could not say that it was unreasonable, although there was no evidence whatever of any expense incurred by the city in this regard—no evidence of any expense to be repaid. Apparently the decision was simply an arbitrary exercise of power, and there was not even an attempt to show that it could be sustained by any one of the elements which are stated by all the authorities to be the foundation of the right to impose a pecuniary charge as part of a police regulation, but because the matter involved only seventy-five dollars per annum, it seems to have been treated as *de minimis*.

In a suit brought by the city of Chester to recover like charges the telegraph company filed an affidavit of defense, in which it averred that the sum claimed as a license tax was unjust and unreasonable in that the amount was at least five times "the usual, ordinary, or necessary expense" of municipal officers of issuing licenses and other expenses thereby imposed upon the municipality of the City of Chester.

As to this the court said:

"The difficulty is it does not go far enough. It refers only to the usual, ordinary, or necessary expense of municipal officers of issuing licenses and other expenses thereby imposed upon the municipality. It makes no reference to the liability imposed upon the city by the erection of telegraph poles. It is the duty of the city to see that the poles are safe and properly maintained, and should a citizen be injured in person or property by reason of the neglect of such duty, an action might lie against the city for the consequences of such neglect. It is a mistake, therefore, to measure the reasonableness of the charge by the amount actually expended by the

city for a particular year to the particular purposes specified in the affidavit."

> Chester City *vs.* Western Union Telegraph Co., 154 Pa., 464.

In a suit subsequently brought by the city of Philadelphia to recover pole and wire license taxes the telegraph company endeavored to meet this statement by the Supreme Court of the elements of justification for such charges by an affidavit of defense, wherein it averred that the charges imposed were more than ten times "not only the cost of regulating the poles and wires and issuing licenses therefor and of the ordinary or necessary expenses imposed upon the city of Philadelphia thereby, but also all extraordinary expenses of the said city of Philadelphia, or its municipal officers, or damages arising from liability imposed upon the city by the erection and maintenance of said poles and wires, and all other costs and damages, liability for damage, loss, injury, and expenses of every nature whatsoever."

The court below made absolute a rule for judgment for want of a sufficient affidavit of defense without opinion, and the opinion of the Supreme Court of Pennsylvania brushed aside the allegation of the affidavit in the following manner:—

> "We find nothing in the record that would justify us in sustaining either of the assignments of error. There was no error in entering judgment against the defendant company for want of a sufficient affidavit of defense."

> Philadelphia *vs.* American Union Tel. Co., 167 Pa., 406.

Without going over the whole list of cases, of which the above are fair samples, it is enough to say that the remainder of them reach the same result by the same reasoning as in those above cited, and that no real attempt has ever been made in any of the cases to affirmatively show that the so-called license fee was based upon, or could be supported by evidence of, the actual expense incurred

by the municipality for the necessary inspection or regulation of the poles and wires licensed, or that it had been in any manner subjected to any expense whatever by reason of the erection and maintenance of the poles and wires, nor was there any evidence of any prospective expense or charge to the municipality by reason of the maintenance thereof.

The reasoning seems to be—

First.—That municipalities have the right under the police power to impose a reasonable license fee upon telegraph poles and wires—which is conceded.

Second.—That the adoption of an ordinance imposing such license is *prima facie* evidence of the reasonableness thereof—which need not be disputed in this case.

Third.—That affirmative evidence that no expense whatever has been incurred by the municipality in respect to such poles and wires does not rebut this presumption of reasonableness—this last proposition is disputed by the plaintiff in error and is the point in controversy in this case.

It is to be noted that there is no allegation of any authority whatsoever to impose the charge sued for, except only in the exercise of the police power; it is not sought to justify it as a tax, nor can it be sustained as such, for it is not based upon any assessment of the property involved.

It is not intended to argue that the Borough of New Hope may not supervise the location of the poles erected to sustain the telegraph wires of the plaintiff in error and require them to be properly painted and marked so as to be readily identified, and make such inspection of them as may be necessary to protect the public welfare, and that for the cost of such regulation and supervision and the issuing of such permits as may be required for the better enforcement thereof, the Borough may impose a reasonable license fee;

in other words, that the municipality may make a telegraph company repay to it the expense to which it has been put by reason of the said telegraph company's occupation of its highways.

It is intended to respectfully insist that any license fee in excess of the amount necessary to so reimburse the municipality is unreasonable, and is a tax upon, and regulation of, the interstate commerce carried on by means thereof, against which the plaintiff in error is entitled to claim the protection of this court. The apparent smallness of the amount involved in some of these cases ought not, and legally cannot, influence the decision thereof, for, obviously, if every hamlet having a municipal organization through which lines of telegraph are run can impose a tax of 66/84 or 66/90 of the gross receipts of the local business and eighteen per cent. of the value of the plant, it is quite plain that the telegraph companies will soon be taxed out of existence.

Recently, and while this brief is in preparation, a Court of Common Pleas of Pennsylvania has held that a Township can impose and collect a pole and wire license tax, and as this seems to be in accord with the decisions of the Supreme Court of that State already cited, it is plain that every telegraph pole and every telegraph wire throughout the State is subject to the same tax, and that telegraph companies will therefore be subjected to a burden, the weight of which is fixed only by the caprice of the township, borough, and city authorities, and which in the aggregate will exceed all their taxes properly so called, that is to say, all the taxes which can be or are levied upon their property at a fair and just valuation and at a rate of taxation which bears equally upon other property.

Indeed, it is confidently asserted that if the rule adopted in Pennsylvania and put in practice by numerous of her municipalities is extended throughout that State and other States, the aggregate of the pole and wire tax thus imposed on telegraph companies will exceed all other taxation and exceed all their net revenues. Obviously, the

amount of such taxation would be enormous, yet it is plain to be seen that there is nothing in the decision now appealed from, or in the cases cited by the court in support thereof, that would in any way protect the plaintiff here from such taxation.

As matter of fact the total amount of these taxes has now assumed very grave proportions and is yearly increasing, and, inasmuch as the courts of Pennsylvania have imposed no restrictions upon the amount that the municipalities may thus impose, and have refused to be bound by the restrictions established by the authorities in respect to such license charges upon other kinds of property or occupations, it leaves the telegraph company helpless, except in so far as the Federal courts will protect it by establishing some rule to which the municipalities must conform.

III.

The rule limiting the amount of a license tax imposed under and in aid of the police power is well established to be the amount of the cost of such supervision and regulation and the cost of issuing the license, and under the power to license, express or implied, it is clear that no right exists to impose a larger charge than will approximately reimburse to the municipality the expense of regulation.

> "A right to license an employment does not imply a right to charge a license fee therefor with a view to revenue, unless such seems to be the manifest purpose of the power; but the authority of the corporation will be limited to such a charge for the license as will cover the necessary expenses of issuing it and the additional labor of officers and other expenses thereby imposed. A license is issued under the police power, but the exaction of a license fee with a view to revenue would be an exercise of the power of taxation, and the charter must plainly show an intent to confer that power, or the municipal corporation cannot assume it."
>
> Cooley on Const. Lim., section 201 (4th ed.).

"The terms in which a municipality is empowered to grant licenses will be expected to indicate with sufficient precision whether the grant is conferred for the purposes of revenue, or whether, on the other hand, it is given for regulation merely. When the grant is not made for revenue, but for regulation merely, a much narrower construction is to be applied. A fee for the license may still be exacted, but it must be such a fee only as will legitimately assist in the regulation, and it should not exceed the necessary or probable expense of issuing the license and of inspecting and regulating the business which it covers."

Cooley on Taxation, section 408 (4th ed.).

"The power to license and regulate particular branches of business or matters is usually a police power, but when license fees or exactions are plainly imposed for the sole or main purpose of revenue, they are, in effect, taxes."

Dillon on Mun. Corp., section 768 (4th ed.).

The charter of the city of Portland authorized it "*to control and regulate slaughter houses, wash houses, and public laundries and provide for their exclusion from the city limits or from any part thereof*," and under that authority the city council passed an ordinance "*to license and regulate wash houses and public laundries*," providing, *inter alia*, for "*a quarterly license of five dollars*" thereon.

Payment of this charge was resisted upon the ground that a fee of five dollars a quarter for a license to keep a wash house was manifestly a mere pretense for imposing an onerous tax on the business.

After citing and commenting upon numerous authorities upon the subject, the court said:—

"It follows that if the sum required of the petitioner by this ordinance is intended for revenue, and not merely regulation, the same is so far void. A fee may be required for a license issued merely as a means of regulation, but the amount must not be more than is necessary

to cover the cost of issuing the license and the incidental expenses attending the regulation of the business."

Laundry License Case, 22 Fed. Rep., 701.

Where the city of Hoboken by ordinance imposed a license tax on passenger railways cars, it was held:—

"Under the power simply to regulate an ordinance cannot be passed to tax for revenue purposes. In the course of the administration of such a power the public treasury may be incidentally benefited by the imposition of fines and penalties, but in all such cases the amounts imposed must be such as are reasonably necessary to accomplish the regulation."

North Hudson Ry. Co. *vs.* Hoboken, 41 N. J. L. (12 Vroom), 71.

The rule by which the reasonableness of the charge imposed is to be measured is thus stated in a case in which the judgment was affirmed by the Supreme Court of Pennsylvania on the opinion of the court below.

"Clearly the reasonableness of the fee is not to be measured by the value of the poles and wires or of the land occupied, nor by the profits of the business. The elements which enter into the charge are the necessary or probable expense incident to the issuing of the license and the probable expense of such inspection, regulation, and police surveillance as the municipal authorities may lawfully give to the erection and maintenance of the poles and wires."

Taylor Borough *vs.* Postal Tel. Co., 202 Pa., 583-584.

But it is confidently asserted that, as has been already shown, in none of the cases has the Supreme Court made any effort to apply the rule which it has thus adopted and announced.

In some suits brought by the City of Philadelphia against the telegraph companies for these pole and wire taxes there has been evidence of something done by the employees of the Electrical Bureau of the City in respect to the poles and wires of telegraph companies, and hence it might have been inferred that the City incurred some expense by reason thereof; but other than these suits there is no case in Pennsylvania in which the municipality showed, or even attempted to show, that it had incurred any expense whatever by reason of the maintenance by the telegraph company of its poles and wires within its limits, or by reason of its regulation and supervision over them, and yet, in every instance, the Supreme Court of that State has sustained the validity of these pole and wire taxes upon the sole and only ground that the presumption was that the charge was reasonable, because the municipality had imposed it.

It is too well settled that under the guise of the power to regulate, a city cannot exercise the power to tax to require the citation at length of further authorities. It is sufficient to refer to

Slate *vs.* Hoboken, 4 Vroom, 280;
New York *vs.* 2d Ave. R. R., 32 N. Y., 261;
Cincinnati *vs* Bryson, 15 Ohio, 625;
Mays *vs.* Cincinnati, 1 Ohio St., 268;
Dunham *vs.* Rochester, 5 Cowen, 462.

IV.

The decisions of this court in the cases of the city of St. Louis against the Western Union Telegraph Company do not apply to or in any wise sustain the claim of the Borough of New Hope in this case.

As these cases are likely to be referred to it may be well to consider them fully.

The city of St. Louis passed an ordinance, viz.:—

> "From and after the first day of July, 1884, all telegraph and telephone companies which are not by ordinance taxed on their gross income for city purposes, *shall*

pay to the city of St. Louis for the privilege of using the streets, alleys, and public places thereof, the sum of five dollars per annum for each and every telegraph or telephone pole erected or used by them in the streets, alleys, and public places in said city."

The Western Union Telegraph Company having declined to pay this charge suit was brought therefor which was tried in the Circuit Court of the United States at St. Louis without a jury and the court there held, that—

"The object of the enactment was evidently to secure revenue for the municipality; hence the burden imposed is a tax, and it is imposed in such form that it can only be regarded as a privilege or license tax which the city has no authority to impose. Judgment will be entered for defendant."

St. Louis *vs.* Western Union Tel. Co., 39 Fed. Rep., 59.

Upon error this court held:—

"And first with reference to the ruling that this charge was a privilege or license tax. To determine this question we must refer to the language of the ordinance itself, and by that we find that the charge is *imposed for the privilege of using* the streets, alleys, and public places, and is graduated by the amount of such use. *Clearly, this is no privilege or license tax.* The amount to be paid is not graduated by the amount of the business, nor is it a sum fixed for the privilege of doing business. It is more in the nature of a charge for the use of property belonging to the city—that which may properly be called rental. * * * Whether the city has power to collect rental for the use of streets and public places, or whether, if it has, the charge as here made is excessive, are questions entirely distinct. That this is not a tax upon the property of the corporation or upon its business or for the privilege of doing business is thus disclosed by the very terms of the section. *The city has attempted to make*

the telegraph company pay for appropriating to its own and sole use a part of the streets and public places of the city. It is seeking to collect rent."

St. Louis *vs.* Western Union Tel. Co., 148 U. S., 92, 97-98.

But this court also added:—

"Indeed, it may be observed, in the line of the thoughts heretofore expressed, *that this charge is one in the nature of rental; that the occupation by this Interstate Commerce Company of the streets cannot be denied by the city;* that all it can insist upon is, in this respect, reasonable compensation for the space in the streets thus exclusively appropriated; and it follows in the nature of things that it does not lie exclusively in its power to determine what is a reasonable rental. The inquiry must be open in the courts, and it is an inquiry which must depend largely upon matters not apparent upon the face of the ordinance, but existing only in the actual state of affairs in the city."

St. Louis *vs.* West. Un. Tel. Co., *supra*, 105.

A petition for a rehearing of this case was filed upon the ground that the city of St. Louis had no such interest in and control over the streets as authorized it to impose a charge in the nature of rental for the exclusive use of portions thereof.

This court filed an opinion denying said petition and therein said:—

"Control over the streets resides somewhere. As the legislative power of a State is vested in the legislature, generally that body has a supreme control, and it delegates to municipal corporations such measure thereof as it deems best. The city of St. Louis occupies a unique position. It does not, like most cities, derive its powers by grant from the legislature, but it framed its own charter, under express authority from the people of the State given in the Constitution, * * * and this char-

ter is an organic Act, so defined in the Constitution, and it is to be construed as organic Acts are construed. The city is in a very just sense an '*imperium in imperio.*' Its powers are self appointed, and the reserved control existing in the General Assembly does not take away this peculiar feature of its charter."

City of St. Louis *vs.* Western Union Tel. Co., 149 U. S., 465-467.

The case was retried by the Circuit Court without a jury, and it was again found that even as rental the sum charged was excessive and judgment was given for the defendant.

St. Louis *vs.* Western Union Tel. Co., 63 Fed. Rep., 68.

An appeal was taken by the city to this judgment, but the judgment was finally confirmed by consent.

But the Borough of New Hope has no such power as has the city of St. Louis. The Constitution of Pennsylvania, Article XVI., section 12, provides:—

"Any association or corporation, organized for the purpose, or any individual, shall have the right to construct and maintain lines of telegraph within this State, and to connect the same with other lines, and the General Assembly shall, by general law of uniform operation, provide reasonable regulations to give full effect to this section."

Pursuant to this mandate the Legislature of Pennsylvania, by Act of 29th April, 1874, section 33, P. L., 92, provided for the incorporation of telegraph companies, and that when incorporated they should be authorized—

"To construct lines of telegraph along and upon any of the public roads, streets, lands, or highways, or across any of the waters within the limits of this State, by the erection of the necessary fixtures, including posts, piers, or abutments, for sustaining the cords or wires of such lines; but the same shall not be so constructed as to

incommode the public use of said roads, streets, or highways, or injuriously interrupt the navigation of said waters."

It will thus be seen that the construction and maintenance of telegraph lines within the State of Pennsylvania, including the cities thereof, are directly authorized by the constitution of that State, and the exercise of the power to construct and maintain such lines is fully authorized by the Legislature of Pennsylvania.

That this legislative authority is all that is needed, and that the municipalities cannot restrict or interfere with the same is plain. The line of decisions in Pennsylvania is uniform that the Commonwealth owns the franchise of every highway, and that no municipal corporation has any power over them except in so far as it is delegated to it by the State.

"To the Commonwealth here as to the King in England belongs the franchise of every highway as a trustee for the public, and streets regulated and repaired by the authority of a municipal corporation are as much highways as are rivers, canals, or public roads laid out by the authority of the Quarter Sessions. In England a public road is called the 'king's highway,' and though it is not usually called the 'Commonwealth's highway' here, it is so in contemplation of law, for it exists only by force of the Commonwealth's authority."

O'Connor *vs.* Pittsburgh, 18 Pa. St., 187-189.

"The power of the legislature to establish a turnpike gate in the streets or public ways of a city is hardly to be questioned; it is a part of the eminent domain which belongs to the sovereign authority. It is conceded to the General Assembly by the grant of all legislative power, and is not restrained by the Bill of Rights. There is nothing in the street of a city or town to make it greater or more distinguished than a highway in the rural districts except convenience and the density of population, and these restrain not the power of legislation. The

power of making and repairing roads and removing nuisances is granted by law to supervisors of highways under the direction of the courts, and they are bound to do it; yet this does not prevent the legislature from authorizing turnpikes and the erection of gates on these roads. Neither does the obligation of cities to open and repair streets interpose any barrier against the right of the sovereign power to regulate its highways, and streets in a town or city are nothing more."

Stormfelt *vs.* Manor Turnpike Co., 13 Pa. St., 555-559.

"In the present case the right to lay the track upon any public road then opened or thereafter to be opened is expressly given, without any qualification, and hence the consent of the borough of Millvale to the construction and operation of the road over its streets need not be obtained and is a matter of indifference. * * * This being so, it will be seen at once that the borough has no control over the construction or operation of the road within its limits. *The power of the defendant in the exercise of its franchise is altogether independent of the borough, and is of just as high and authoritative origin as the right of the borough to exist at all.* The rights of both are derived from the same source, to wit, the legislative power of the Commonwealth, and the company is not subject to the slightest obligation to go to the borough for consent to exercise any part of its corporate franchise. Any other doctrine would subordinate the corporate franchise of the defendant to the will of the borough councils, and cannot be sanctioned for a moment."

Millvale Bor. *vs.* Evergreen Ry. Co., 131 Pa. St., 1-23-24.

"The right of the Supreme legislative power to authorize the building of a railroad on a street or other public highway is not to be doubted. * * * If such conversion of a public street to purposes for which it was not originally designated does operate severely upon a

portion of the people, the injury must be borne for the sake of the far greater good which results to the public from the cheap, easy, and rapid conveyance of persons and property by railway. The commerce of a nation must not be stopped or impeded for the convenience of a neighborhood."

Commonwealth *vs.* R. R. Co., 27 Pa. St., 339-354.

The rule in Pennsylvania in this regard is indeed so thoroughly settled that it is not necessary to multiply further these citations. Other and equally strong expressions will be found in—

Case of Philadelphia & Trenton R. R. Co., 6 Wharton, 25;
Commissioners *vs.* Gas Co., 12 Pa. St., 318;
Mercer *vs.* Pittsburgh, &c., Ry. Co., 36 Pa. St., 99;
Danville, &c., R. R. Co. *vs.* Commonwealth, 73 Pa. St., 29;
City of Pittsburgh's App., 115 Pa. St., 4;
Williamsport Pass. Ry. Co.'s App., 120 Pa. St., 1;
Homestead Street Ry. *vs.* Pittsburgh, &c., Ry. Co., 166 Pa. St., 162.

The result of these authorities is thus summarized by a text writer of authority:—

"By virtue of its authority over public ways, the legislature may authorize acts to be done upon them, or legalize obstructions therein, which would otherwise be deemed nuisances. As familiar instances of this may be mentioned the authority to railway, water, telegraph, and gas companies to use or occupy streets and highways for their respective purposes. And it may be here observed that whatever the legislature may authorize to be done is, of course, lawful, and of such Acts, done pursuant to the authority given, it cannot be predicated that they are nuisances. If they were such without, they cease to be nuisances when they have the sanction of a valid statute.

> As respects the public or municipalities, there is no limit upon the power of the legislature as to the uses to which streets may be devoted."
>
> 2 Dillon Mun. Corp., section 657 (3d ed.).

It is perfectly clear, therefore, that in Pennsylvania there is no power in a municipality to impose any charge upon telegraph companies by way of rental for the use of its streets, because they are expressly authorized by the Constitution and laws of that State to occupy the highways with their poles and wires. Indeed, it will be conceded that the only source of power of the Borough of New Hope to pass the ordinance in question is in its general police power over its streets.

By the Act of 1851, relating to Boroughs of Pennsylvania, it is provided that such Borough shall have power—

> "To make such laws or ordinances, by-laws, and regulations, not inconsistent with the laws of this Commonwealth, as they shall deem necessary for the good order and government of the borough."

The clause of the Act of 1851 referring to the regulation of streets is as follows:—

> "To regulate the roads, streets, lanes, alleys, courts, common sewers, public squares, common grounds, footwalks, pavements, gutters, culverts, and drains, and the heights, grades, widths, slopes, and forms thereof, and they shall have all other needful jurisdiction over the same."

This was slightly enlarged by the Act of May 22d, 1883, by the addition thereto of the following language:—

> "They shall have power to survey lay out, enact, and ordain footwalks, pavements, gutters, culverts, and drains over and upon the lands abutting on and along the sides of turnpike roads, which may be within the limits of said boroughs, and to fix the size and widths thereof, and to require the grading, curbing, and guttering thereof by

> the owner or owners of land respectively fronting thereon in accordance with the general regulations prescribed."

This is the whole source of the power of the Borough of New Hope to pass the ordinance in question.

The Act of 1851 specifies minutely the subjects which the Borough may regulate by ordinance, and as to this Act the Supreme Court of Pennsylvania has held:—

> "We are of the opinion that the general powers referred to in the first section must be confined to the particular subjects referred to in succeeding sections. There is no analogy between this ordinance (the one then under discussion) and one requiring coal, hay, or produce to be inspected or weighed, for this is expressly authorized by the Act of 1851, *nor with an ordinance requiring a telegraph company to pay a fixed sum for each of its poles, for this fairly comes within the police power over the streets given by the same Act.*"
>
> Millerstown *vs.* Bell, 123 Pa., 151.

It will, therefore, be seen that in the St. Louis cases when the court below held that the charge imposed was a license tax and unreasonable and therefore void, the judgment was reversed by this court upon the ground that the charge was not a license tax at all, but was a rent for the use of the space occupied by the poles in the highways, which under the constitution of Missouri, peculiar in that respect, the city of St. Louis had a right to impose, but that, inasmuch as "*the occupation by this interstate commerce company of the streets cannot be denied by the city,*" it was for the trial court to determine whether the rental charged was reasonable; and it furthermore appears that upon a retrial of the case in conformity with the instruction given by this court the court below again decided that, as a rental, the charge was unreasonable, and this judgment, although at first appealed from, was finally acquiesced in by the city.

The Borough of New Hope, however, has no power to impose any charge by way of rental, and it has been expressly stated by the Supreme Court of Pennsylvania that the only authority the Borough has to impose a license tax upon telegraph poles and wires is derived, not from the express provisions of the Act of Assembly, but from its general police power, and it, therefore, follows that its power in this behalf must be limited by the rules governing the imposition of pecuniary charges as part and in aid of police regulation of business agencies or property, or otherwise the telegraph company, which is engaged in interstate commerce, is unjustly deprived of the protection which the Constitution of the United States affords it.

V.

Nor can the plaintiff in error be held to pay the charge imposed in this case for the purpose of providing an insurance or guarantee fund to insure the municipality from damages for which it may be held liable by reason of the construction and maintenance of telegraph poles and wires.

This seems, however, to be the controlling thought in the decisions of the Supreme Court of Pennsylvania, which holds that the usual, ordinary, or necessary expense of issuing licenses, &c., makes no provision for the liability imposed upon the city by the erection of telegraph poles, and that as it is the duty of the city to see that the poles are safe and properly maintained—

> "Should a citizen be injured *by reason of the neglect of such duty*, an action might lie against the city for the consequences of such neglect."
>
> Chester City *vs.* Western Union Tel. Co., 154 Pa., 464 (*supra*), page 6;
> Phila. *vs.* American Union Tel. Co., 167 Pa., 406 (*supra*), page 6.

It will no doubt be urged, therefore, in justification of the reasonableness of the charge imposed in this case, that in the event of injury to person or property from the

improper construction or maintenance of a telegraph pole or wire, the municipality would be liable therefor, and that it therefore has the right to protect itself therefrom by imposing such license charges upon the plaintiff in error as will provide a fund for the payment of such damages.

Inasmuch, however, as the municipality cannot exclude the telegraph company from occupying its highways with their poles and wires, as declared by this court in St. Louis *vs.* The Western Union Tel. Co., 148 U. S., 92-98, *supra*, page 12, and as is expressly permitted both by the Constitution and the statutes of Pennsylvania, it is plain that such municipality cannot be in any way held liable merely because such poles and wires are constructed and maintained upon its highways. And it therefore appears that any liability which may be imposed upon the municipality by reason thereof, if indeed any there be, must of necessity arise from the neglect of the municipality to properly exercise its police power to inspect, regulate, and supervise the construction and maintenance of such poles and wires. Indeed, this is expressly so stated by the Supreme Court of Pennsylvania in Chester *vs.* West. Un. Tel. Co., just quoted.

But it is respectfully insisted that it cannot be that a municipality has the right to impose upon a telegraph company the cost to it of its supervision and regulation of the property of that telegraph company, and at the same time and in addition thereto collect from it other sums of money to reimburse it for damages to which it may be subjected by reason of the insufficiency of the regulation and supervision which it has undertaken, or the negligence with which it has performed the duty it has assumed in that behalf, and the cost of which it has already imposed upon and collected from the telegraph company. In other words, the telegraph company cannot be made the insurer to the municipality against liability for the negligence of the municipality itself.

And furthermore, in case of injury to person or property by negligence in the construction and maintenance of telegraph poles and wires, the telegraph company would

itself be primarily liable to the party injured, and certainly cannot call upon a municipality to repay to it any damages which it might be held to pay in such case, although it had through the payment of license charges provided a fund for such purpose. Nor will the telegraph company, after having itself paid the damages, be entitled to ask the return to it of the moneys which it had already paid to the municipality as its insurance against liability for such injury. And again, is it not clear that, in case of injury to person or property by the negligent construction or maintenance of telegraph poles and wires for which the municipality is held liable, such municipality can maintain its action therefor against the telegraph company?

If, therefore, the telegraph company is itself liable to any person injured by reason of the negligent construction and maintenance of its poles and wires, and is liable over again to the municipality if the municipality is held liable for such negligent construction and maintenance, and if the payment of the license charge in question does not operate to exonerate the telegraph company from such liability, it would seem to follow that the municipality cannot sustain the charge upon that ground, and especially that it cannot do so where its liability, that is to say, the liability of the municipality, clearly cannot arise except by reason of its own negligence in the exercise of its police power of regulation and supervision.

> "The City cannot collect and lay by a sum to insure itself against imaginary future demands which may possibly arise. If it properly discharges its duty of control and supervision no such demands can arise. It is responsible alone for vigilance and care in these respects. It may, possibly, at some time be subjected to expenditure in resisting unjust claims. This, judged by the past, is not probable. A very trifling annual surplus would provide for it. But, as the contingency is remote, such provision may well be left until it occurs."
>
> Philadelphia *vs.* West. Un. Tel. Co., 40 Fed. Rep., 616.

It is not intended to argue that the municipality cannot, under its police power and by way of a license charge, impose upon the telegraph company the cost to it of the proper exercise of its police power in the supervision and regulation of telegraph poles and wires: that case is not before this court, and never has been, and probably never will be, for the reason that the business necessities of the telegraph companies compel them to maintain their poles and wires in a high state of efficiency and, therefore, of safety. The case is wholly a suppositious one. No evidence was offered, or could be offered, that the municipality had ever been put to any expense whatever on account of this supposed liability, and it is therefore respectfully insisted that it is impossible to argue that a charge can be imposed upon an instrument of interstate commerce by way of insurance when such insurance does not in any way protect or reduce the liability of the party paying the money and the thing insured against is the negligence of the party to whom it is paid.

VI.

That the Western Union Telegraph Company is engaged in interstate commerce and that the business it transacts is in itself commerce, and that by virtue of the Act of Congress of July 24th, 1866, and its acceptance thereof said telegraph company is entitled to all the privileges and immunities and is subject to all the restrictions which flow from the power given to Congress by the Constitution to regulate commerce, and the legislation in that behalf enacted by Congress, as distinctly decided in

Telegraph Co. vs. Telegraph Co., 96 U. S., 1,

a case which has been so often referred to and reasserted by this court as to need no further comment.

VII.

The validity of regulations, whether imposed by a State or a municipality, which, under the guise of an exercise of the police power, impose pecuniary charges upon persons

or corporations engaged in interstate commerce, have been frequently before this court.

Where a State statute imposed a license tax upon drummers and others selling by sample within a certain taxing district, although it made no discrimination between those who represented business houses out of the State and those who represented like houses within the State, it was nevertheless held by this court to be invalid, for the reason that it was a burden on, and, therefore, a regulation of interstate commerce, and as such unconstitutional.

The power of the State to exercise, by virtue of its police power, jurisdiction over persons and property within its limits and provide for the security of the lives, limbs, health, and comfort of persons and the protection of property within those limits, even although it may incidentally affect commerce is not questioned. But it is distinctly stated by this court that interstate commerce cannot be taxed at all by the State, and that the fact that the tax is imposed by a law or an ordinance purporting to be an enforcement of the police power, or a privilege tax, can make no difference in the application of the rule.

Robbins *vs.* Shelby Taxing District, 120 U. S., 489.

And this has been since reaffirmed in—

Asher *vs.* Texas, 128 U. S., 129;
Stoutenburgh *vs.* Hennick, 129 U. S., 141;
McCall *vs.* California, 136 U. S., 104;
Brennan *vs.* Titusville, 153 U. S., 289.

That the Western Union Telegraph Company cannot be made to pay a license tax of $245 per annum to the city of Mobile for the privilege of carrying on its business therein has been decided by this court in—

Leloup *vs.* Port of Mobile, 127 U. S., 640.

An Act of the Legislature of the State of Kentucky, entitled an "Act to regulate agencies of foreign express companies," which imposed upon such agents an annual tax of

five dollars with certain small fees for the filing of certain papers relating to the business of the company and required to be filed in the office of the auditor of public accounts was held void as a regulation of commerce.

Crutcher *vs.* Kentucky, 141 U. S., 47;

Although the right of a State in the due exercise of its police power to regulate the inspection and sale of articles of food cannot be questioned, yet this court has always been careful to consider whether under the guise of inspection and of the exercise of the power of protection any burden has been laid upon interstate commerce, and if so, whatever the form of the imposition was, the regulation has been declared unconstitutional and void.

Hannibal & St. J. R. R. Co. *vs.* Husen 95 U. S., 465;
Minnesota *vs.* Barber, 136 U. S., 313;
Brimmer *vs.* Rebman, 138 U. S., 78.

Even where the regulation imposed was in relation to the selling of intoxicating liquors, which is peculiarly a matter of police cognizance, this court has repeatedly held that the power must be so exercised as not to operate as a burden on or regulation of interstate commerce.

Leslie *vs.* Hardin, 135 U. S., 100;
Lyng *vs.* Michigan, 135 U. S., 161.

The councils of Titusville, Pa., by an ordinance to provide for the levy and collection for general revenue purposes of annual license taxes in the city of Titusville, imposed a license fee of twenty-five dollars a year upon persons convassing or soliciting within that city orders for goods, books, paintings, wares, or merchandise of any kind, and for a violation thereof imposed a fine not exceeding $100, for a breach of which ordinance one Brennan was convicted and fined twenty-five dollars by the city recorder. The defendant appealed to the Court of Common Pleas, which rendered judgment against him, and then appealed to the Supreme Court of the State, which affirmed the judgment of the court below, and thereupon sued out a writ of error to this court.

The power of the city of Titusville to levy the license tax in question was clearly given by the Act of the Legislature of Pennsylvania of 22d May, 1874, section 20, clause 4 (P. L., 239), viz.:—

> "*To levy and collect license tax* on auctioneers, contractors, druggists, hawkers, peddlers, bankers, brokers, pawnbrokers, merchants of all kinds, grocers, confectioners, restaurants, butchers, taverns, public boarding houses, dram shops, saloons, liquor sellers, billiard tables, bowling alleys, and other gaming tables; drays, hacks, carriages, omnibuses, carts, wagons, street railroad cars and other vehicles used in the city for pay; lumber dealers, furniture dealers, saddle or harness dealers, stationers, jewelers, livery stable keepers, pavement stands, real estate agents, express companies or agencies, telegraph companies or agencies, shows, theatres, and all kinds of exhibitions for pay, and regulate the same by ordinance."

This court said:—

> "The ordinance itself is entitled: 'An ordinance to provide for the levy and collection for general revenue purposes of annual license taxes in the city of Titusville,' and the special section requires a license for transacting business, the license being graded in amount by the time for which it is obtained. This license, therefore, the failure to take out which is the offense complained of, and for which defendant was sentenced, is a license for 'general revenue purposes,' within the very declarations of the ordinance. *Even if these declarations had been the reverse, and the license in terms been declared to be enacted as a police regulation, that would not conclude this question, for whatever may be the reason given to justify or the power invoked to sustain the Act of the State, if that Act is one which trenches directly upon that which is within the exclusive jurisdiction of the National Government, it cannot be sustained.*"

Brennan *vs.* City of Titusville, 153 U. S., 289-299.

Without repeating the language of this court in others of these cases above cited the result of their reasoning may be summarized to be that the police power of a State and, *a fortiori*, of a municipality cannot obstruct interstate commerce beyond the necessity for its exercise. That the question of whether or not under the guise of the exercise of the police power a burden has been laid upon interstate commerce is always open in this court, and the law or ordinance in controversy will be carefully scrutinized to ascertain whether or not any such burden has been in fact imposed; that any charge upon the agent or the agencies involved in the transaction of interstate commerce is a burden upon commerce itself, and cannot be imposed by a State, and, *a fortiori*, by a municipality, without the assent of Congress; and that the silence of Congress in this respect is equivalent to a declaration on its part that it should be absolutely free.

Under these cases, and especially under Leloup *vs.* Mobile (*infra*), which is directly in point, it is clear that the Borough of New Hope cannot impose a charge of sixty-six dollars a year, or any other sum, upon the Western Union Telegraph Company as a license tax upon its occupation, or for the purpose of doing business within the limits of that Borough, but that such tax must be limited to such sum as will reimburse the Borough for the expenses incurred by it in the proper police regulation of the business and agencies of the plaintiff in error.

VIII.

If it be true that the sum charged by the Borough of New Hope against the Western Union Telegraph Company cannot be justified as a tax, not only because it is not based upon any assessment, but also because the Borough is without power to impose such tax, if it be true that it is not a charge in the nature of rental for the use and occupation of such part of the highway as is occupied by the company's poles, because again the Borough has no power to impose such charge in Pennsylvania, and if it be true that the only authority in the Borough to impose such

charge is by virtue of its police power, as it is believed has been conclusively shown in this case, and if the law is that such charge must be limited to such sum as is reasonably necessary to accomplish the police regulation and cover the expenses attending such regulation, as has also been conclusively shown by the authorities cited, then it must be conceded that the evidence affirmatively shows that the charge in question here is excessive, unreasonable, and therefore void.

Although it must be admitted that neither the value of the property or the amount of the receipts from the business which is subjected to police regulation furnish the measure of the charge which as incident to such regulation may be imposed thereon, yet when it is found that the amount of such charge is about eighteen per cent. annually of the whole value of the property, and about seventy-five per cent. of the gross receipts of the telegraph business of the Borough—charges so enormous as to be obviously far beyond the limit of just taxation—it certainly suggests, that, however small the sum involved, the limit of discretion in the exercise of the police power has been overstepped.

A fortiori, therefore, when it is conclusively shown that the Borough has never incurred or been put to any expense whatever in connection with or as incident to the exercise of its police power in any way whatsoever, it follows that the charge sought to be imposed is completely without foundation in right, and that the collection of the amount, however small it may be, is in effect little better than confiscation.

It cannot be denied that the plaintiff in error is engaged in interstate commerce and that its poles and wires are the necessary instrumentalities thereof; it cannot be denied that the charge imposed and sought to be recovered here for the maintenance of said poles and wires is a charge upon and regulation of interstate commerce; and although such poles and wires are subject to proper police regulation by the States and municipalities, and as incident thereto, to a license charge which will reimburse

the cost of such regulation, notwithstanding they are such instrumentalities of interstate commerce—just as they are liable to taxation the same as other property—yet it cannot be denied that it is peculiarly the province of this court to finally determine whether such license charge is, or is not, a proper police regulation and can be lawfully levied, because if it is not, then it is not only unlawful and invalid by general rules of law, but is prohibited by the Constitution of the United States.

The charges sought to be imposed by the ordinance in question are imposed according to the language thereof "for the maintenance of each and every telegraph pole" and "for the maintenance of each and every mile of telegraph wire." (Record, page 20.) But there is no more right in the State or in the municipality to charge for the privilege of maintaining the poles and wires, than there is to charge for the privilege of maintaining an office. The charge is attempted to be justified by the claim that it is in the exercise of the police power, but reimbursement, and reimbursement only, is the ground upon which a pecuniary charge can be sustained as a police regulation, and if it appears that the charges made in this case exceed the limit of reimbursement, then the question of whether or not the amount of the charges are otherwise reasonable or unreasonable for the company to pay is beside the question, for the moment that the amount needed for reimbursement is exceeded, whether intentionally or otherwise, then so far as commerce and its instrumentalities are concerned, the power of the municipality to impose the charges ceases. It is therefore denied that there is any right in the Borough of New Hope to impose any charge in the case under consideration, because as there is nothing to reimburse there can be nothing to sustain the charge made, and the Borough or State of Pennsylvania itself not only has no authority, but it is prohibited by the Constitution of the United States from imposing any such charge.

As against such charge the plaintiff in error is entitled to the protection of the commerce clause of the Constitu-

tion of the United States, as declared and enforced by this court, and it is, therefore, respectfully contended that it is the duty of this court to decide for itself whether the ordinance of the Borough of New Hope imposing the charge, the subject of controversy here, is a legitimate exercise of the police power, or is, under the guise thereof, in fact a burden upon and therefore a regulation of the interstate commerce business of the plaintiff in error.

This court has said:—

"The police power cannot be set up to control the inhibitions of the Federal Constitution or the powers of the United States Government created thereby."

Walling *vs.* Michigan, 116 U. S., 446-460.

"The Supreme Court of the United States holds, and has never consciously held otherwise, that a statute of the State and, *a fortiori*, a municipal ordinance intended to regulate, or to tax, or to impose any other restriction upon the transmission of persons or property or telegraph messages from one State to another, is not within that class of legislation which the States may enact in the absence, of legislation of the Congress, and that such statutes are void even as to such part of transmission as may be within the State."

Railway Co. *vs.* Ill., 118 U. S., 557.

"And while, by virtue of its jurisdiction over business and property within its limits, a State may provide for the security of the lives, limbs, health, and comfort of persons, and the protection of property so situated, yet the subject matter which has been confided exclusively to Congress by the Constitution is not within the jurisdiction of the police power of the State unless placed there by congressional action."

Leslie *vs.* Hardin, 135 U. S., 100-108.

"But the main argument to support the decisions of the Court of Appeals is that the Act in question is es-

sentially a regulation made in the fair exercise of the police power of the State. But it does not follow that everything which the legislature of a State may deem necessary for the good order of society and the well being of its citizens can be set up against the exclusive power of Congress to regulate the operations of foreign and interstate commerce."

Crutcher *vs.* Kentucky, 141 U. S., 47-59.

"Even if it be that we are concluded by the opinion of the Supreme Court of the State that this ordinance was enacted in the exercise of the police power, we are still confronted with the difficult question as to how far an Act held to be a police regulation, but which in fact affects interstate commerce, can be sustained. It is undoubtedly true, that there are many police regulations which do affect interstate commerce, but which have been and will be sustained as clearly within the power of the State; but we think it must be considered, in view of the long line of decisions, that it is well settled that nothing which is a direct burden upon interstate commerce can be imposed by the State without the assent of Congress, and that the silence of Congress in respect to any matter of interstate commerce is equivalent to a declaration on its part that it should be absolutely free."

Brennan *vs.* Titusville, 153 U. S., 289-302.

That a license tax, irrespective of whether the amount is much or little, where levied upon the occupation itself, or upon the means of carrying on the business, is, where the business carried on is interstate commerce, a direct burden upon interstate commerce, has been abundantly settled by the adjudications of this court.

Thus, where an importer was required to take out a license and pay a fee of fifty dollars therefor before he was permitted to sell a package of imported goods, it was said:—

"All must perceive a tax upon the sale of an article imported only for sale is a tax on the article itself. * * * So a tax on the occupation of an importer is in like manner a tax on importation."

Brown *vs.* Maryland, 12 Wheaton, 419-444.

"Where the business or occupation consists in the sale of goods the license tax required for its pursuit is in effect a tax upon the goods themselves. If such a tax be within the power of the State to levy, it matters not whether it be raised directly from the goods, or indirectly from them through the license to the dealer; but if such tax conflict with any power vested in Congress by the Constitution of the United States, it will not be any the less invalid because enforced through the form of a personal license. * * * The power of the State to exact a license tax of any amount being admitted, no authority would remain in the United States, or in this court, to control its action, however unreasonable or oppressive."

Welton *vs.* Missouri, 91 U. S., 275-278-281.

Where the Mobile police board fixed the license tax of the Western Union Telegraph Company at $225 per year, this court held the ordinance invalid, and said:—

"Can a State prohibit such a company from doing such a business within its jurisdiction unless it will pay a tax and procure a license for the privilege? If it can, it can exclude such companies and prohibit the transaction of such business altogether. We are not prepared to say that this can be done. Ordinary occupations are taxed in various ways, and in most cases legitmately taxed, but we fail to see how the State can tax a business occupation when it cannot tax the business itself. Of course, the exaction of a license tax as a condition of doing any particular business is a tax on the occupation—a tax on the occupation of doing a business is surely a tax on the business. Now, we have decided that communication by telegraph is commerce, as well as in the nature

of postal service, and if carrried on between different States, it is commerce among the several States, and directly within the power of regulation conferred upon Congress, and free from the control of State regulations except such as are strictly of a police character.* * * *

"In our opinion, such construction of the Constitution leads to the conclusion that no State has a right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce or on the receipts derived from that transportation, or on the occupation or business of carrying it on, and the reason is that such tax is a burden on that commerce, and amounts to a regulation of it, which belongs solely to Congress. This is the result of so many recent cases that citation is hardly necessary."

Leloup *vs.* Port of Mobile, 127 U. S., 640-645-648.

It is respectfully submitted that any charges upon the poles or wires of a telegraph company, which are the necessary means of carrying on the business, is as much a tax on that business as would be a license fee exacted from the agent of the company as a condition of his being permitted to exercise his function, or as an occupation tax.

The case of the Postal Telegraph Company *vs.* Charleston, 153 U. S., 692, may be cited. In that case (page 699)—

"The express terms of the ordinance restricted the tax to the business done exclusively within the city of Charleston, and not including any business done to or from points without the State, and not including any business done for the Government of the United States, its officers, or agents."

And of this ordinance this court said (page 700):—

"If business done wholly within the State is within the taxing power of the State, the courts of the United States cannot review or correct the action of the State in the exercise of that power,' and therefore, inasmuch as the Supreme Court of South Carolina 'had judicially settled

that the power to raise revenue by license tax on business, given by statute to the city council of Charleston, does not violate any provision of the State Constitution,' the occupation tax levied in that case was upheld."

There is, therefore, nothing in the facts, the reasoning, or the decision in that case which is applicable to the case under discussion.

Of the charge in controversy in this case it should be noted that it is not a tax properly so called—it does not profess to be such, and is not based upon the value of the property involved, nor has there been any previous assessment thereof which is a condition precedent to valid taxation. It cannot be justified as a rental for the use of the streets, because the power to occupy those streets is given expressly by the Constitution and laws of Pennsylvania, and the Borough of New Hope has, under the authorities cited, no such authority or interest therein, or power in the premises as to enable it to charge such rental. It cannot be justified as a business or occupation tax imposed for the purposes of revenue, because the Borough of New Hope is without power to levy such tax, and even if such power had been conferred upon it it would have availed nothing. The State cannot itself impose or authorize a municipality to impose any tax upon an instrumentality of interstate commerce except by permission of Congress, as in respect to this plaintiff in error has been expressly decided by this court in Leloup *vs.* Mobile, already cited.

The lines of the plaintiff in error extend into all the cities and towns of the United States and into almost all the boroughs and villages—they have been extended into any place, however small, where population has been concentrated.

For the transaction of the business of communicating intelligence between these different points the poles of the company are as necessary as the wires through which the electric current flows, and if it be conceded, as it is conceded, that every municipality, large or small, has the right to exercise such supervision over and regulation of the poles and wires as may be needed to protect its residents from the possible negligence of the company itself, and to

impose therefor such charge upon it as may be necessary to reimburse itself the expense it thereby incurs, it follows that unless the courts interpose to limit the charges so imposed strictly within the power of the municipality, it leaves the telegraph company subject to impositions, which, in the aggregate, have already become a serious burden, and are likely, indeed certain, in the near future to become very onerous.

Each municipality, without power to impose a tax, except upon the tangible property of the company; each generally without power to charge any rental for the use of its streets, and each without the power to impose any occupation or business tax upon the company or its agents—can yet effect the same purpose by a charge, professedly based upon the number of poles within its limits, for a supervision and regulation which rarely in fact is ever exercised, and in no case is as efficient as that of the company's own agents. Accidents, indeed, from the falling of telegraph poles, or the breaking of telegraph wires are so rare that the record of the veriest few is to be found in the report books.

Telegraph companies in Pennsylvania pay not only a tax upon their capital stock, which represents the value of their property, but they also pay another tax upon their gross receipts, which represents the earning power of that property—thus, in fact, they pay a double tax, first, upon the value of the property; and, secondly, upon the value of its use—and yet in this case a Borough is permitted to impose yet another tax of sixty-six dollars a mile upon their poles and wires, an amount which is eighteen per cent. of the value thereof and an amount which is more than two-thirds of the gross local business done in the borough, even if it was done by the Western Union Company.

Nevertheless, when these pole and wire license tax cases come before the Supreme Court of Pennsylvania that court seems to disregard entirely this gross disproportion, and sixty-six dollars is in itself perhaps a small sum to regard the objection as *de minimis*, and seem, unconsciously no doubt, to compare the amount involved with the whole capital and

the whole business of the Western Union Company, and not at all with the amount of the expense of the alleged police supervision and regulation, to which under the well-settled authorities it should be limited. Thus has sprung up a system of an absolutely illegal, very onerous, and rapidly increasing taxation, not only in Pennsylvania, but in other States, and this has now gone so far that in a case just decided by a Court of Common Pleas of Pennsylvania, while this brief is in preparation, *a pole and wire tax imposed by a township has been sustained*, so that, as the law now stands in that State, every pole and every wire therein is liable to be subjected to a charge to be imposed by the municipalities in which they are, which confessedly very much exceeds in amount the limits of taxation, and which is nearly four times the cost of the maintenance and repair of the poles and wires themselves, and the measure of which seems to be confided solely to the discretion of the city, borough, and township authorities, because no other rule has ever been practically applied thereto by the courts of that State.

Against these charges, which, if carried to their necessary conclusion, will constitute the most onerous burden, by far, to which telegraph companies are subjected—in fact, if adopted in other States, would absorb nearly the whole net earnings of the telegraph companies—those companies have no protection except that afforded by the prohibition implied in the commerce clause of the Constituton of the Unted States, a protection which can only be made effective by the action of this court, and to extend which was one of the reasons for its creation. The plaintiff in error now confidently seeks in this case to have extended to it by this court the protection conferred by that Constitution.

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No. 101.—OCTOBER TERM, 1902.

Supreme Court of the United States.

THE WESTERN UNION TELEGRAPH COMPANY,
Plaintiff in Error,

against

THE BOROUGH OF NEWHOPE,
Defendant in Error.

Petition and Argument for Rehearing.

SILAS W. PETTIT,
RUSH TAGGART,
HENRY D. ESTABROOK,
For Plaintiff in Error.

JOHN F. DILLON,
Of Counsel.

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Supreme Court

OF THE UNITED STATES.

THE WESTERN UNION TELEGRAPH COMPANY,
Plaintiff in Error,

vs.

THE BOROUGH OF NEWHOPE,
Defendant in Error.

October Term, 1902.
Number 101.

IN ERROR TO THE SUPERIOR COURT OF THE STATE OF PENNSYLVANIA.

Petition and Argument for Rehearing.

The Western Union Telegraph Company, plaintiff in error, respectfully petitions for a rehearing in the above cause, and assigns as reasons therefor:

FIRST. The Court erred in assuming that the ordinance of the Borough of Newhope was enacted by said borough as a police regulation merely, with the sole intention and purpose of *reimbursing* said borough for the necessary expense incurred on behalf of plaintiff in error in the supervision and regulation of its poles and lines of telegraph in said borough; for that said ordinance in express terms purported to be and was in fact and in effect a tax levied upon telegraph, telephone and electric-light companies *for a privilege and*

authority to maintain their poles and wires in the Borough of Newhope.

SECOND. The Court erred in holding that such ordinance, or such of its terms as imposed a tax for a privilege and authority to maintain poles and electric wires in said Borough of Newhope, was a valid police and municipal regulation not amounting to a regulation of interstate commerce, particularly where applied to telegraph companies, such as plaintiff in error, that had accepted the burdens, restrictions and obligations of the Act of Congress, July 24, 1866.

THIRD. The Court erred in misapprehending the nature and extent of the propositions conceded by counsel for plaintiff in error in argument ; for that counsel did not wish nor expect to be understood as conceding any one of the following propositions : (1) The right of a municipality to tax by license ordinance a telegraph company that had accepted the burdens, restrictions and obligations of the Act of Congress, July 24, 1866 ; (2) nor the *prima facie* validity and reasonableness of the ordinance in question ; (3) nor that the *onus probandi* was on the person or company attacking the validity or reasonableness of such an ordinance. On the contrary, the plaintiff in error claims : (1) That no municipality has a right to tax or burden a telegraph company accepting the restrictions and obligations of the Act of Congress, July 24, 1866, except such tax be for revenue purposes on its actual property, in common with all citizens, the municipality being thereunto authorized by legislative enactment, or except the charges imposed be in the nature of rental for property of the City actually and exclusively appropriated by the telegraph company ; and that to permit every municipality in the United States, under

the guise of a license tax, to exact from a telegraph company, so peculiarly an agency of the Government and of interstate commerce, a sum of money *onerous in amount, and undefined or vague in purpose*, would be to restrict and even thwart the rights granted by the Congress of the United States under the act aforesaid; (2) that there is no presumption of reasonableness or validity attaching to an ordinance of a municipality, *the sole object of which is to obtain reimbursement for actual expenditure* (even if the ordinance in question could be so construed), and that both upon principle and the rules of evidence, the burden should be upon the municipality itself to justify its exaction; (3) that an ordinance which levies an annual tax of a dollar a pole to reimburse a municipality of one thousand inhabitants for expenditures to be incurred for an occasional inspection of such pole, when the pole so inspected costs not more than three dollars, is, on the face of it, unreasonable and unjust; and that an ordinance of a village which every year exacts two dollars and a half per mile for the inspection of a telegraph wire, without discriminating as to the size or material of the wire to be inspected, or the manner of its erection or maintenance, or the use of the same, or the quality of electric current carried thereon, or its relationship to other electric wires and the quality of current carried by them, is, on the face of it, unreasonable and unjust.

FOURTH. The Court, in referring to the case in 202 Pennsylvania, 532, erred in inferring that the case there considered was similar to the case at bar, inasmuch as the reasonableness of the ordinance was submitted to a jury in *Borough of Newhope vs. Postal Telegraph Cable Company* (202 Pa., 532), which jury returned a

verdict in favor of the borough FOR LESS THAN THE AMOUNT CALLED FOR BY THE ORDINANCE.

That a comparison of that case with the record in this will show that both cases were tried on the same day, before the same Court and the same panel of jurors, and for a similar cause of action; and that while in this case the ordinance of the borough was enforced, in the Postal Case there was a substitution of the discretion of the jury for that of the Burgesses. And plaintiff in error insists that an ordinance, levying any sort of tax, which, on its face or by judicial construction, is thus made to operate partially and unequally, as different juries may differently determine, is unreasonable and void.

FIFTH. The Court erred in approving generally the rules laid down by the State courts of Pennsylvania for determining the reasonableness or unreasonableness of a license tax ordinance; particularly so much of the doctrine of said State courts as allows compensation to the municipality *for the supposed dangers to, and possible liability of the municipality growing out of the negligent construction and maintenance of telegraphic poles and wires.* And in this behalf the petitioner shows unto this Honorable Court that if an ordinance, arbitrarily fixing the amount of a license tax, is to be taken as *prima facie* reasonable and just; if the elements determining the reasonableness of such ordinance shall be the expense of issuing licenses, inspection and surveillance not only, but also the payment of councilmen for all extra meetings they may choose to hold, as well as the insurance of the municipality against remote and speculative "liability imposed upon the city by the erection of telegraph poles;" then it must needs follow that every such ordinance, *imposing a tax in*

any amount whatsoever, will be declared just and reasonable by the courts BECAUSE THERE IS NO EVIDENCE POSSIBLE OR CONCEIVABLE TO NEGATIVE THE PRIMA FACIE PRESUMPTION OF REASONABLENESS GIVEN TO SUCH ORDINANCE. It would be vain for the licensee to show that during the current year the municipality had expended no amount of money whatever in the way of inspection or surveillance—*for that was done in this case;* or to show that during the entire life of the ordinance, say four or five years, the municipality had expended no amount whatever for such purposes, and that there had been no necessity for such expenditure—*for that was done in this case;* but, because, as stated in the case of *Chester City vs. Telegraph Company* (154 Pa., 464), *quoted with approval by this Court,* "The difficulty is it" (the evidence) "*does not go far enough.* It refers only to the *usual, ordinary or necessary expense of municipal officers, of issuing license and other expenses thereby imposed upon the municipality.* IT MAKES NO REFERENCE TO THE LIABILITY IMPOSED UPON THE CITY BY THE ERECTION OF TELEGRAPH POLES!"

Graft this doctrine upon the law of taxation—*establish by the pronouncement of this august tribunal the right of every municipality to provide an insurance fund against possible liability from the conduct of a lawful business out of that very business*—and you have created A NEW SPECIES OF TAXATION, so vague in purpose and impossible of definition, that all and all manner of ordinary taxation—state, federal and municipal, aggregated and combined—would soon seem insignificant.

Under the principle announced by this Honorable Court (approving as reasonable the ordinance here involved, as well as the impossible test imposed by the doctrine of the State courts of Pennsylvania for deter-

mining its *un*reasonableness), every village, hamlet, township, county, municipality and State in the Union has the right to impose a license tax upon your petitioner of one dollar per pole each year within their respective limits, and two dollars and a half per mile of wire each year, and that this is not an extreme case or a remote speculation, we, the accredited counsel in this case affirm (*dehors* the record, to be sure) that *the case at bar is only one of eight hundred claims now pending, involving ordinances of eight hundred different municipalities, all to the same purpose as the ordinances here involved.*

Furthermore, counsel with equal solemnity affirm that the published annual reports of the plaintiff in error show that it owns two hundred thousand miles of poles in the United States, there being on an average of about thirty-five poles to the mile; that it owns over one million miles of wire; and that if every pole erected by it, and every mile of wire maintained by it, should be taxed at the rate imposed by the Borough of Newhope—which, according to the census, has about one thousand inhabitants—the license tax which your petitioner would be required to pay each year would amount to nearly ten millions of dollars, or nearly one and a half times its entire net earnings.

WHEREFORE, your petitioner will ever pray, &c.

WESTERN UNION TEL. CO.

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ARGUMENT.

It is true that counsel for your petitioner have read with considerable apprehension a recent contribution to one of our periodicals made by a member of this Court, who, after describing the painstaking consideration given to every cause presented to the Supreme Court of the United States, says :

" It is not strange, therefore, that when a case has passed through such handling, the opinions of the justices are quite firmly fixed ; and it is not often that they are convinced of error or mistake, and thus petitions for rehearing are seldom sustained."

And yet there have been occasions when the particular Justice, who made this statement, has had occasion to reconsider causes determined by him, and when no amount of painstaking consideration or pride of opinion has deterred the learned Justice from receding from a position which, on further argument, he has been convinced was untenable and unjust.

See, for instance, *East Omaha Land Company vs. Jeffries* (40 Fed. Rep., 386).

Despite the disheartening remark in the periodical referred to, therefore, we venture to hope that the petition for a rehearing in this case will be granted, basing that hope upon the conceded fallibility of every human tribunal, and the anxiety of this, the greatest of such tribunals, to correct an error, when convinced that error has been committed.

The petition for rehearing sets forth the specifications of errors complained of ; it is the purpose of this argument to somewhat elaborate them.

It is conceded that any tax upon interstate commerce, *as such*, is illegal and void.

It is conceded that the plaintiff in error, having accepted the burdens, restrictions and obligations of the Act of Congress, July 24, 1866, has the *right* to occupy with its poles and wires the streets of the Borough of Newhope, Pennyslvania, *so long as such occupation does not interfere with the ordinary travel upon said streets, and, if required, so long as it shall pay to the municipality or the state a just compensation for whatever property of the borough or state it may have exclusively appropriated* (St. Louis case, cited *post.*).

And it must also be conceded (inasmuch as petitioner's acceptance of the obligations and limitations of the Act of Congress referred to has made the Federal Government the potential owner of its lines of telegraph), that the petitioner is a somewhat extraordinary agency of interstate commerce and is, in theory and in fact, an agency of the Federal Government (Tel. Co. vs. Texas, 105 W. S.).

At all events, it is conceded that if the tax levied against the petitioner, under the ordinance of the Borough of Newhope complained of, is a tax on interstate commerce, as such, or on petitioner's right to occupy the streets of such borough under its federal franchise, then such tax is illegal, and the ordinance imposing it is nugatory and void. In other words, it is conceded that the petitioner may have paid to the State of Pennsylvania, and to the Borough of Newhope, its proportionate share of general taxes levied against its actual property; that it may have compensated the Borough of Newhope for whatever portion of its streets petitioner has exclusively appropriated and occupied; that it may have satisfied the State of Pennsylvania

and the Borough of Newhope, for whatever taxes have been levied as a license to do a purely intra-state business; *and that the particular tax, levied under the particular ordinance, is a tax different and additional to those enumerated.*

The Tax Under the Ordinance Complained of is a Tax on the Right or Authority to Maintain Telegraph Lines.

The ordinance itself says so.

The first section of the ordinance reads as follows (Record, p. 15, Ex. A): "Be it ordained and enacted by the Town Council of the Borough of Newhope, that before any telegraph, telephone or electric light poles shall be erected, or telegraph, telephone or electric light wires shall be run along, over or under any street, lane or alley of the Borough of Newhope, *permission to do so shall be first obtained from the Town Council* by the corporation, firm or individual who proposes to erect such poles and run such wires, *such permission to be granted by ordinance only.*

The material portion of Section 2 reads as follows:

"On or before the first day of October next, *and annually thereafter*, such owner or lessee shall make application to the Burgess for *a license to maintain* the poles and wires theretofore erected for the ensuing year, specifying the poles by their designation of name or initials and number, as provided by this section, and wires by the streets along, over or under which they run. The Burgess shall, upon the production to him, by the applicant, of the receipt of the borough treasurer for the license fees hereinafter provided for, issue a license, *which shall authorize the maintenance of the*

poles and wires designated in the application, for the period of one year from that date.

Section 3 of the ordinance reads as follows:

"That *for the maintenance* of each and every telegraph, telephone and electric light pole within the limits of said Borough of Newhope, *the owner or lessee thereof shall pay* to the borough treasurer an annual license fee of one dollar; and *for the maintenance* of each and every mile of telegraph, telephone and electric light wire within the limits of the said borough, *the owner or lessee thereof shall pay* to the borough treasurer FOR THE USE OF SAID BOROUGH an annual license fee of two dollars and fifty cents."

For what specific "use of said borough" are these taxes levied? For what purpose does the ordinance itself *say* they are levied? Is it to cover the cost of *inspection?* Is it to *reimburse* the city for actual or probable expenditure for and on account of the companies affected? The ordinance itself does not say so, directly or indirectly. On the contrary, it declares that when the amount specified shall be paid, as a condition precedent, *such payment "shall authorize the maintenance of the poles and wires designated in the application for the period of one year from that date," and the money shall be for the "use of said borough" generally.*

Is it not a perversion of language—is it not a stretch of judicial prerogative—for the State courts of Pennsylvania to read into this ordinance an intention different from that specifically declared?

So far as electric light companies or local telephone companies are concerned, it is possible that the Borough of Newhope had the right, under its charter, to impose a license tax for the privilege or authority to erect and build electric lines within its limits. *If,*

in the exercise of such possible right, it should undertake to pass an ordinance imposing a privilege tax, what language could it use to express its intention materially different from the language here employed? For the courts to say that the purpose of the ordinance is fundamentally different from the purpose actually expressed, is to rob the worthy burgesses of their vocabulary.

We used to hear such expressions as "*strictissimi juris*" and "proceedings *in invitum*," in connection with tax laws. While these words have become obsolete there is no good reason for going to the other extreme (see Cooley on Taxation, Chap. IX.).

WHEN A TAX IS LEVIED UPON INTERSTATE COMMERCE, OR ITS INSTRUMENTALITIES, THE RULING OF A STATE COURT THEREON HAS NO GREATER SANCTION THAN THE *reasons* GIVEN FOR ITS RULING; THE EFFECT, REASONABLENESS AND VALIDITY OF THE TAX ARE PECULIARLY MATTERS FOR FEDERAL DETERMINATION.

Petitioner's Rights Under the Act of Congress, July 24, 1866.

Considered merely as an ordinary agency of interstate commerce, the petitioner should be exempt from this tax upon its right and authority to maintain its telegraph lines in the Borough of Newhope. *But the petitioner is something more than an agency of interstate commerce;* IT IS PECULIARLY AND EMPHATICALLY AN AGENCY OF THE FEDERAL GOVERNMENT, for it has accepted the burdens, restrictions and obligations of the Act of Congress, July 24th, 1866 (see Record, p. 27, fol. 54).

As is well known, this Act of Congress had its genesis in a suggestion that the Government build its own telegraph lines. Assume that this suggestion had taken definite shape, and that the lines of telegraph here involved were not simply potentially, but actually, the property of the Federal Government; would the tax in question be valid, and would the Federal Government, as a condition precedent to the maintenance of its lines of telegraph in the Borough of Newhope, be under the obligation to pay to that borough each year a dollar for every one of its poles, and two dollars and fifty cents for every mile of wire within the limits of the borough? *If so, could the contiguous borough charge a like amount, and so on and on to the Pacific Coast?*

We venture the opinion that if the Federal Government were obliged to make contribution from its exchequer, at this rate, to all the boroughs and hamlets in the country, the business of government telegraphy would be an expensive experiment. It goes without saying that such municipal exactions would not be tolerated.

But it is evident, not only from the title and context of the Act of July 24, 1866, but from the debates in Congress, that it was the purpose of the Federal Government to give to such telegraph companies as might be induced to accept the burdens, restrictions and obligations of the act, almost as great rights and immunities as the Federal Government itself would have had if its original purposes had been carried out, and the lines of telegraph constructed at Government expense. Indeed, the acceptance of the provisions of this act constitutes the Federal Government potential owner of the properties and effects of the telegraph company, for it

exacts an option for the purchase of such properties and effects at an appraised value. It further requires that the telegraphic communications between the several departments of the Government and its officers and agents shall have priority over all other business. It further provides that the charges for the transmission of governmental messages shall be such as are annually fixed by the Postmaster-General, and by amendment June 10, 1872, denounces penalties of from one hundred dollars to one thousand dollars for each refusal or neglect on the part of the telegraph company to transmit meteorological observations at military stations and other points. May it not be fairly asserted that a telegraph company, thus burdened and obligated, is, in a peculiar degree, the agency of the Federal Government?

If it be conceded that no State or municipality may impose restrictions upon *any* agency of interstate commerce, *a fortiori* may they not burden or condition the right of a telegraph company, accepting the obligations of the Act of July 24, 1866, to occupy the post roads of the United States with its telegraph lines, *so long as the same shall not interfere with the ordinary travel on such post roads.* HERE IS THE ONLY LIMITATION IMPOSED BY THE ACT ITSELF—to wit, non-interference with the ordinary travel on the post roads of the United States (see U. S. Rev. St., Sections 5263 to 5268).

The first section of the act declares: "But such lines of telegraph shall be so constructed *and maintained* as not to * * * interfere with the ordinary travel on such military or post roads." This provision requires that the original construction, not only, but the subsequent maintenance of the lines shall not interfere with such ordinary travel. Hence, the right of such a tele-

graph company under the act of Congress to occupy the post and military roads of the United States depends upon an actual state of facts at any time existing, whether at the time of construction or at any time subsequent thereto.

Surely with a right so limited, a governmental agency so burdened should not be compelled to reimburse itself out of the general public, which it is thus commissioned to serve, for exactions made upon it by every borough of one thousand inhabitants in the United States.

Senator Sherman, of Ohio, who was the special champion of this bill, in answering the question of Senator Nye, of Oregon, as to whether the act would authorize the telegraph company accepting its terms to construct telegraph lines in the United States, wherever they had a mind to do so, replied:

"*Let me ask the Honorable Senator where is the objection to allowing telegraph companies to extend their telegraph lines anywhere in the United States? Would you not like to have them extended to every man's homestead, if it could be done?* WHY NOT?"

And subsequently Senator Sherman declared:

"Any telegraph company organized in a State may run the wires anywhere along the post routes; *they may take them to every man's door if they choose,* IF IT WILL PAY" (see Cong. Globe, Part IV., 1st Session, 39th Congress, pp. 3480 to 3490).

We respectfully submit that Senator Sherman's policy, thus outlined, has been amply justified by the event; for, whereas in 1866 the price of a telegram of ten words from San Francisco to Washington was ten dollars in gold (as frequently asserted in debate), the same service is to-day performed, as may be ascer-

tained at any telegraph office, for one dollar—a reduction of 90 per cent.

Now, the published reports of the Western Union Telegraph Company show that it has in the United States over 200,000 miles of poles with about 35 poles to the mile; that it owns over one million miles of wire. There is not a borough, hamlet or municipal or political subdivision in the United States that is not anxious and eager to relieve its local citizens from the burdens of taxation at the expense of foreign corporations. Is there any peculiarity about the Borough of Newhope, (which, according to the official census, has 1,000 inhabitants), giving it greater rights of taxation than any other village, or hamlet, or county, or township in the United States? If not, then under the ruling in this case every mile of wire owned by the petitioner is subject to a license tax of two dollars and fifty cents each year, and every pole owned by the petitioner is subject to a license tax of one dollar each year, and we have the aggregate of nearly ten millions of dollars license tax—about one and a half times greater tax than the entire net earnings of the company!

We assert *(dehors* the record, to be sure, but as accredited officers of this Court) that the present is only one of eight hundred similar claims *made by eight hundred different municipalities*, chiefly in the State of Pennsylvania, involving ordinances of similar import, and, in some cases, identical in language with the one here involved.

If the doctrine of the State Courts of Pennsylvania is given the approval of the Supreme Court of the United States in this case, we can conceive of no possible defense to these claims, or to any claim of like

character made anywhere in the United States. If, in addition to its general taxes, such license taxes throughout the country, aggregated and combined, would not constitute a grievous burden upon interstate commerce—compelling the petitioner to readjust its tariffs as the burden from time to time increased—then the well-known language of Chief-Justice MARSHALL in *McCulloch vs. Maryland*, 4 Wheaton, 426, and in *Osborne vs. United States Bank*, 9 Wheaton, 737, has lost its significance.

Burden of Proof.

It is contended that, while a municipality has no power to levy a tax upon interstate commerce or its agencies, or an agency of the Federal Government, *for the purposes of revenue*, it may, nevertheless, under its police powers *recoup* itself *for the expense of regulating such agency in the occupation of its streets and the conduct of its business*, and that a license tax imposed for this purpose—to wit, *reimbursement*, is valid *if reasonable*, and that any ordinance passed by a City Council *with the declared object of reimbursement* is *prima facie* reasonable, the burden of proving its *unreasonableness* being upon the person or company affected.

We have already pointed out that the ordinance under consideration does not in terms impose the tax complained of to reimburse it for actual or probable expenditure on behalf of the petitioner, but does expressly declare that the tax is imposed as a condition precedent to a grant of authority to maintain its wires and poles in the Borough of Newhope, and that the

proceeds from the tax are for the use of the borough generally.

We have also suggested, and wish here to emphasize the suggestion, that *money, from whatever source derived, flowing steadily into the coffers of a State or municipality, is "revenue."* If not, what is it? To meet the expenses of administering its government, *safeguarding its citizens*, making its improvements, *and regulating the business and social relations of its inhabitants*, every state, either directly or through its municipalities, levies taxes on *property, franchises* or *occupations*. The moneys so derived are called its revenues. These revenues are created and collected *for the sole purpose of reimbursement* for actual or probable expenditure of some kind, for it is not the part of a State or municipal government to accumulate money beyond its ordinary expenditures.

To say, therefore, that a tax upon property is revenue, that a tax upon franchises is revenue, that a tax upon occupations is revenue, but that a tax by way of indemnity for the regulation of a particular business is *not* revenue, is a solecism; and to say that a tax for "revenue" on interstate commerce or its agencies would be void, but that a tax to reimburse for the expense attending the regulation of such agencies is valid, is, in its essence, the sheerest casuistry.

But what we are now combating is the doctrine that an ordinance, which, on its face or by judicial construction, imposes a tax for the sole purpose of reimbursing for actual or probable expenditure in the regulation of an interstate business, is *prima facie* reasonable.

We earnestly contend that the burden of proof should be upon the city to show the reasonableness of such an ordinance, and for the following reasons:

First. We start with the conceded proposition that interstate commerce and its instrumentalities should be free, unburdened and untrammeled. We add the further proposition that a tax to be paid out of the earnings of a business is, *pro tanto*, a burden on that business, no matter for what purpose the tax may be levied ; *it is the cash payment that constitutes the burden and the euphony of a word does not lighten it.* If, then, a municipality proposes to impose this burden under some doctrine of police regulation, which imposition would be absolutely illegal *unless* reasonable, why should not the municipality, in the very nature of things, be compelled to justify its exaction.

Second. The tax being ostensibly for reimbursement for moneys expended or to be expended to the use of another, and the action for the recovery of the tax being in *assumpsit*, the claim of the municipality is one sounding in contract, and it would certainly violate fundamental principles to permit a person or corporation to sue for money paid, or to be paid, to the use of another, and to throw the burden on the defendant to prove that no such money had ever been expended on his account.

Third. Furthermore, it is a cardinal rule of evidence that if a party to a litigation has within his possession and under his control the best and easiest, or only means to prove a particular fact, he must offer proof of its existence, or judicial presumption will be against him. Now, if a municipality has actually expended money on behalf of another, or if it has incurred liability on behalf of another, it alone best knows that fact, and could easiest offer evidence of it. To say that the petitioner is immune from license tax, *unless such tax is reasonable*, and then as a condition to its

general immunity compel it to prove a negative, to wit, that the particular tax is *un*reasonable, is to graft an extraordinary exception on the rules of evidence.

The Supreme Court of the United States in *City of St. Louis vs. W. U. Tel. Co.*, 148 U. S., 92, had determined that a reasonable charge in the way of rental for property of a city exclusively appropriated to the use of the telegraph company was proper, but the *amount* of the charge was for judicial determination, its reasonableness depending upon the particular facts. On the further hearing of the case before Judge PHILLIPS to enforce the provisions of an ordinance exacting from the telegraph company five dollars a pole, Judge PHILLIPS says (63 Fed. R., 68-73): "Under the decision of the Supreme Court in this case, under the power to regulate, the city may, by ordinance, require the company to pay for the use of such streets. The city in such case is the sole judge of the necessity and wisdom of such an ordinance; and the ordinance *making such requirement* would be *prima facie* reasonable, but as to the amount of the rental, which is the reasonable value of the use and no more, the case is *sui generis; and upon what principle of common right and justice the party demanding the rent should be permitted to establish for itself a prima facie value by adopting the ordinance and throwing the whole burden of establishing its unreasonableness upon the defendant, is not apparent to my mind.* The defendant company is in the city, with its poles and wires on the streets under the paramount authority of an act of the Federal Congress. It comes as a governmental agency in performing an important function in interstate commerce. It neither asks, nor can the city demand, any permit or license to be and remain on such public highway.

It has the right to demand the use of the plaintiff's streets and alleys, and the plaintiff must submit to such use with or without ordinance. But as the defendant occupies public property under the dominion of the city, the city has a right, by ordinance, to demand what? Not such rental therefor as to its legislative body may seem just and proper, but such rental as may represent what is reasonable for the use of the territory appropriated.

"So, while the Court, in this case, said an ordinance like that is *prima facie* reasonable, we are to look at what the learned Justice said later on *as to what extent that reasonableness should go*; for in the final summing up of this question he said:

"'Indeed, it may be observed, in the line of thought heretofore expressed, that this charge is one in the nature of rental; that the occupation by this interstate company of the streets cannot be denied by the city; that all it can insist upon is, in this respect, reasonable compensation for the space in the streets thus exclusively appropriated. And it follows, in the nature of things, that *it does not lie exclusively in its power to determine what is reasonable rental. The inquiry must be open in the courts.*'"

Judge PHILLIPS was here guiding himself by the opinion of this Court, and was seeking to give full force to the doctrines therein announced. His understanding of the opinion of this Honorable Court was, that the ordinance in question was *prima facie* reasonable, in requiring *some* compensation, *but that no presumption whatever attached to the amount of compensation specified.*

The Ordinance and the Evidence.

The ordinance of the Borough of Newhope under consideration ought, we think, to be declared unreasonable and void on account of provisions which it does *not* contain.

For instance, it does not provide that the poles and wires of the various electrical companies named *shall be inspected.*

It does not provide that the borough itself, or any of its officers, *shall do any specific act in connection with such poles and wires.*

It does not provide any officer or department, *whose duty it shall be to inspect poles or wires.*

It prohibits the erection of petitioner's telegraph lines without an ordinance—thereby showing conclusively that it taxes petitioner's *right* to do a telegraphic business.

No distinction is made between the poles and wires of an electric light company and the poles and wires of a telephone or telegraph company, and yet the dangers, and the necessary inspection in consequence of the dangers, in the use of a telegraph wire are very different from the dangers attending the use of an electric light wire, and the rules of law pertaining to the use of each are also very different.

Possibly a municipality would be justified in permitting wild animals to be kept on the premises of the owner, or a powder magazine to be erected on its outskirts, or electric light currents of electricity to be carried along its streets ; but, surely, a license tax for the regulation and control of these ought to be differ

ent in amount from the tax imposed on the keeper of "a harmless necessary cat," or the manufacturer of baking powder, or a telegraph or telephone company. For the dangers are different; the rules governing the use of the properties are different; the amount of care, inspection, surveillance, is different, and an ordinance taxing them all alike would, therefore, be unreasonable and unjust.

The evidence in the case shows that the ordinance of the Borough of Newhope under consideration had been in operation four years at the time of the bringing of this suit.

The evidence shows that during the *first* year no officer of the Borough of Newhope ever inspected the wires or poles of the petitioner, and that the borough itself had incurred no expense whatever in relation thereto.

The evidence shows that during the *second* year no officer of the Borough of Newhope ever inspected the wires and poles of the petitioner, and that the borough itself was at no expense whatever in relation thereto.

The evidence shows that during the *third* year no officer of the Borough of Newhope ever inspected the poles and wires of the petitioner, nor was the borough itself at any expense whatever in relation thereto.

The evidence shows that during the *fourth* year no officer of the Borough of Newhope ever inspected the wires and poles of the petitioner, nor was the borough itself at any expense whatever in relation thereto.

If the petitioner had paid the taxes levied for these four years, what would have become of the money? One thing certain, it would not have been applied to reimburse the Borough of Newhope for any expenditure on behalf of the petitioner, for there was none.

To be sure, a Pennsylvania case, cited with seeming approval by this Court, says that the fact that a municipality was at no expense for inspection during the current year for which the tax was levied, is not conclusive as to the unreasonableness of the tax. Is it equally inconclusive when it is shown that the municipality has been at no expense for the first, and second, and third, and fourth year, inclusive? Must the petitioner pay for inspection, not because any officer of the Borough of Newhope has ever inspected, but because at some indefinite future time he is just as like as not to do so? Or shall the Borough of Newhope, under the guise of a license tax and a police power, be permitted to accumulate an insurance fund against some possible conjectural liability? Is this doctrine, for instance, announced in *Chester City vs. Western Union Tel. Co.*, 154 Pa., 464, to become the law of the land for the taxation of interstate commerce and its instrumentalities?

"It is the duty of the city," say the Court, "to see that the poles are safe and properly maintained, and should a citizen be injured in person or property by reason of the negligence of such duty an action might lie against the city for the consequences of such neglect. *It is a mistake, therefore, to measure the reasonableness of the charge by the amount actually expended by the city for a particular year to the particular purposes specified in the affidavit.*"

Or, this, for instance, from the case of *Philadelphia vs. American Union Tel. Co.*, 167 Pa., 406, where the Court say:

"*Not only the cost of regulating the poles and wires and issuing licenses therefor and of the ordinary and*

necessary expenses imposed upon the city of Philadelphia thereby, but also all extraordinary expenses of the said city of Philadelphia, or its municipal officers, or damages arising from liability imposed upon the city by the erection and maintenance of said poles and wires, and all other costs and damages, liability for damage, loss, injury and expenses of every nature whatsoever."

Is not the foregoing a somewhat startling, not to say alarming, amplification of the pristine limitation of a license tax under the police powers of a city?

Hitherto it has been the accepted opinion among lawyers that a license tax should be limited to the actual cost of issuing the license (see *Welsh vs. Hotchkiss*, 39 Conn., 143; Cooley Const. Lim., Ed. 1886, p. 242), but under the doctrine of the Pennsylvania Courts, seemingly approved by your Honors in this case, the reasonableness of the tax imposed under a license ordinance is to be determined, not by the cost of issuing the license, not by the actual expense of inspection, but also by the "damages arising from liability imposed upon the city by the erection and maintenance of said poles and wires, and all other costs and damages, liability for damages, loss, injury and expenses of every nature whatsoever."

Under this doctrine, why should not the Borough of Newhope have levied a tax on petitioner's property of ten dollars a pole and twenty dollars a mile for wire? How could petitioner prove the unreasonableness of such a tax? What Judge or jury is gifted with a clairvoyance capable of forseeing the remote speculative damages and liability, to cover which the tax is imposed?

In *Ford vs. Standard Oil Company* (32 Hun, 596),

an ordinance of the City of Auburn, in the State of New York, created the office of oil inspector, and provided further that his fees for services of inspection should be one-half cent a gallon, to be recovered from the owner of the property inspected. It was proven that the market price of oil was six cents a gallon, consequently the inspection charge of one-half a cent a gallon amounted to eight and one-half per cent. of the value of the property inspected. The Court held that the ordinance was illegal and void: (1) *because no restrictions were imposed on the inspector or rules established regulating his conduct, and (2) because the fee fixed was excessive, being eight and one-half per cent. of the property inspected.*

In the case at bar there is not only failure to create the office of inspector, or any department charged with the duty of doing anything with relation to petitioner's property, *but the tax on petitioner's poles is equal to thirty-three and one-third per cent. of the cost of the poles and from eight to twelve per cent. of the cost of the wire, dependent on whether it is of iron or copper.*

In the *City of Saginaw vs. Swift & Co.*, 72 N. W., 6, an ordinance to regulate the putting up, taking down, maintaining and repairing telegraph, telephone and electric light poles and wires, provided that "the City of Saginaw shall cause all poles used and maintained and kept by any person, company or corporation for stringing or sustaining his or its electrical wires or cables in said city, *to be inspected once a year to ascertain whether the same are secure and maintained in accordance with this ordinance of said city, and such person, company or corporation shall pay to said city for such inspection the sum of fifty cents per annum for*

each pole so maintained by him or it." It will be observed that this *did* provide for inspection; not only so, but the poles of the defendant company *were actually inspected*, and, as the proof showed, at a cost of not more than five cents a pole.

The Court say:

"While we think it is proper for the city to make a reasonable inspection, and we are not prepared to say that this is not reasonable, there is no occasion for requiring the electric company to pay more than a sum sufficient to pay the reasonable cost of such inspection. The pole is in plain sight, may be easily ascended, if necessary, and an examination as to soundness below the surface cannot be difficult or expensive. * * * The company has a right to exist and do business by virtue of the statute. It depends upon the city only for its right to lay, construct and maintain its conduits for electricity through streets, etc. This consent was given by resolution of May 9, 1881, the only qualification being that the poles should be erected under the supervision of the street commissioner. * * * The consent contemplated by the statute was given, and the defendant had a right to erect its poles and carry on its business, subject to the right of the city under the statute to prescribe reasonable regulations. As already stated, we consider this an unreasonable one."

This, we submit, is the true exposition of the law relating to a license tax *where a municipality is empowered to impose such tax.* The doctrine of the State Courts of Pennsylvania is not only novel, but dangerous; for it permits a municipality, under the guise of a license tax, which in theory should be a bagatelle, to reimburse it for the cost of issuing a license, to levy a

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tax in comparison with which all other taxes, aggregated and combined, amount to nothing.

The whole question involved in this case can be summed up in a single sentence. *Is a tax on petitioner's property, amounting to from eight to thirty-three per cent. of the actual cost and value of the property taxed, and which, if applied to its entire property subject to such exaction, would more than absorb its entire net earnings, for no specific regulation, and to reimburse for no actual expenditure on its behalf, such a burden as amounts to a regulation of interstate commerce, and a special agency of the Federal Government?*

It seems to us that on more thorough consideration this question can be answered only in the affirmative.

May we, in closing, venture to ask your Honors whether, had this been an appeal by the Borough of Newhope from a judgment of the State Court pronouncing the ordinance in question unreasonable and, therefore, an illegal restraint upon interstate commerce, your Honors would have affirmed such a decision? If so, would there not be involved in the admission, the tacit acknowledgment that each State has the right to determine for itself whether an ordinance of one of its municipalities is or is not a restraint upon interstate commerce, and a contravention of the Federal Constitution? And could such a right in the State result in anything but discord and uncertainty?

We respectfully insist that it is the duty of this Court, wholly untrammeled by State decisions, to determine:

FIRST. Whether or not every municipality has the right to impose a tax upon interstate commerce or its instrumentalities, or upon a telegraph company which

has accepted the provisions of the Act of Congress, July 24, 1866.

SECOND. If so, to outline the rationale of such a municipal tax and indicate generally the limitations of the power.

Respectfully submitted,

SILAS W. PETTIT,
RUSH TAGGART,
HENRY D. ESTABROOK,
Counsel for Petitioner.

JNO. F. DILLON,
Of Counsel.

In the Supreme Court of the United States.

WESTERN UNION TELEGRAPH COMPANY, Plaintiff in Error, vs. THE BOROUGH OF NEW HOPE, Defendant in Error.	October Term, 1902. No. 101.

BRIEF OF DEFENDANT IN ERROR.

The plaintiff in error claims (1) that affirmative evidence that no expense whatever has been incurred by the defendant in error in respect to the poles and wires, which are the subjects of the provisions of the ordinance in question, rebuts the presumption of the reasonableness of the license fees prescribed thereby, raised by the adoption of said ordinance, and (2) that said ordinance therefore imposes a burden upon and is a regulation of, interstate commerce and is void as to plaintiff.

In reply to this the defendant in error respectfully submits:

1. The possession of power by the municipality to inspect and regulate the erection and maintenance of poles and wires

in its streets implies a duty to do so, which duty, it is presumed, the municipality will discharge. It is empowered therefore to impose license fees to indemnify it against, or reimburse it for, any expense which may be incident to such supervision and regulation. It is not a condition precedent to this exercise of its police power, however, that it actually shall have incurred such expenses. In some instances that would be not only impracticable but impossible. A company constructing a new line would be required to take out a license to erect its poles and string its wires before commencing the work of construction. At that time no expense of supervision could have been incurred. The fees prescribed by this ordinance have not been fixed with reference to the value of the company's property located within the municipal limits of the borough, or the amount of the gross receipts of the business of the company, transacted there in a given period. The proportion which they bear thereto is an irrelevant consideration. The Supreme Court of Pennsylvania, in affirming a judgment of the court below, has thus stated the rule by which the reasonableness of the license fee imposed is to be determined:

> "Clearly the reasonableness of the fee is not to be measured by the value of the poles and wires, or of the land occupied, nor by the profits of the business. The elements which enter into the charge are the necessary or probable expense incident to the issuing of the license and the probable expense of such inspection, regulation, and police surveillance as the municipal authorities may lawfully give to the erection and maintenance of the poles and wires."
>
> Taylor Borough vs. Postal Tel. Co., 202 Pa. 583, 584.

In another case in which it was averred in the affidavit of defense that the rates charged were at least five times the

amount of the expense involved in the supervision exercised by the municipality, the Supreme Court of Pennsylvania said :

> "For the purposes of this case we must treat this averment as true as far as it goes. The difficulty is it does not go far enough. It refers only to the usual, ordinary or necessary expenses of municipal officers, of issuing licenses and other expenses thereby imposed upon the municipality. It makes no reference to the liability imposed upon the city by the erection of telegraph poles. It is the duty of the city to see that the poles are safe, and properly maintained, and should a citizen be injured in person or property by reason of a neglect of such duty, an action might lie against the city for the consequences of such neglect. It is a mistake therefore to measure the reasonableness of the charge by the amount actually expended by the city for a particular year, to the particular purposes specified in the affidavit."

Chester City vs. Western Union Telegraph Company, 154 Pa. 466.

The rate of license fees fixed in this ordinance is one dollar per pole and two dollars and fifty cents per mile of wire, per annum, which are the rates prescribed in the ordinances in the cases cited by the court below in its opinion in this cause (Record page 5). In none of these cases were these rates declared to be unreasonable. In the present instance the annual charge imposed upon the plaintiff in error amounts to sixty-six dollars a year, or five and a half dollars per month. The fixing of these rates by the Borough Council in the first instance, it is conceded by the plaintiff in error, is *prima facie* evidence of the reasonableness of the ordinance,

and, it is respectfully submitted, there is nothing in the record of this cause that rebuts the presumption.

2. While it is admitted that the business in which the plaintiff in error is engaged is interstate commerce and that the poles and wires which it maintains within the limits of the Borough of New Hope are instruments which it uses in the conduct of its business, it is denied that such property is exempt from the police regulations of the municipality. While the municipality is without power to exclude these poles and wires from its streets, public welfare requires it to see that said poles and wires are not so erected or maintained as to become a menace to the safety of those who use its streets as highways. This involves the right and the duty of regulation by the borough and such regulation under the police power is not an attempt to regulate the business of the telegraph company. This case is easily distinguishable from those of Brown vs. Maryland, 12 Wheat. 419, Almy vs. State of California, 24 How. 169, 173, Leloup vs. Port of Mobile, 127 U. S. 640, Brennan vs. City of Titusville, 153 U. S. 589, and others cited by the plaintiff in error.

This Court has clearly indicated the distinction in the following language :

> " In our opinion such a construction of the Constitution leads to the conclusion that no State has the right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, and the reason is that such taxation is a burden on that commerce

and amounts to a regulation of it, which belongs solely to Congress. This is the result of so many recent cases that citation is hardly necessary. As a matter of convenient reference we give the following list: *Case of State Freight Tax, 15 Wall. 232; Pensacola Telegraph Company vs. Western Union Telegraph Co. 96 U. S. 1; Mobile vs. Kimball, 102 U.S. 691; Western Union Telegraph Co. vs. Texas, 105 U. S. 460; Moran vs. New Orleans, 112 U S 69; Gloucester Ferry Co. vs. Pennsylvania, 114 U. S. 196; Brown vs. Houston, 114 U. S. 622; Walling vs. Michigan, 116 U. S. 446; Picard vs. Pullman Southern Car Co., 117 U. S. 34; Wabash Railway Co. vs. Illinois, 118 U. S. 557; Robbins vs. Shelby County Taxing District, 120 U S. 489; Philadelphia & Southern Steamship Co. vs. Pennsylvania, 122 U. S. 326; Western Union Telegraph Co. vs. Pendleton, 112 U. S. 347; Ratterman vs. Western Union Telegraph Co. ante 411*

"We may here repeat, what we have so often said before, that this exemption of interstate and foreign commerce from State regulation does not prevent the State from taxing the property of those engaged in such commerce located within the State as the property of other citizens is taxed, nor from regulating matters of local concern which may incidentally affect commerce, such as wharfage, pilotage and the like. We have recently had before us the question of taxing the property of a telegraph company in the case of *Western Union Telegraph Co. vs. Massachusetts, 125 U. S. 530.*"

Leloup vs. Port of Mobile, 127 U. S. 640.

And again in a Pennsylvania case, the same distinction was drawn in the following language:

> "It is undoubtedly true that there are many police regulations which do affect interstate commerce, but which have been and will be sustained as clearly within the power of the State; but we think it must be considered, in view of the long line of decisions that it is well settled that nothing which is a direct burden upon interstate commerce can be imposed by the State without the assent of Congress and that the silence of Congress in respect to any matter of interstate commerce is equivalent to a declaration on its part that it should be absolutely free."

Brennan vs. Titusville, 153 U. S. 289.

It is therefore respectfully submitted:

1. That the provisions of this ordinance do not constitute an attempt on the part of the municipality to regulate or impose a burden upon interstate commerce.

2. That the adoption and enforcement of said ordinance is a lawful exercise of the police power with which said borough is vested under the Constitution and laws of Pennsylvania.

WM. C. RYAN,
For Defendant in Error.

Supreme Court of the United States.

No. 101.—October Term, 1902.

The Western Union Telegraph Company, Plaintiff in Error, vs. The Borough of New Hope. } In error to the Superior Court of the State of Pennsylvania.

[January 5, 1903.]

By an ordinance passed in 1894, the borough of New Hope, Pennsylvania, imposed an annual license fee of one dollar per pole and two dollars and a half per mile of wire on the telegraph, telephone, and electric light poles and wires within its limits. The Western Union Telegraph Company had constructed prior thereto and had since maintained and operated a line of telegraph poles and wires through the borough, and this was an action brought in the Court of Common Pleas of Bucks County, in that State, against the company to recover license fees for the four years commencing with 1895. The case came on for trial before the court and a jury, and plaintiff put in evidence the ordinance in question, and it was agreed "between the parties that for the year beginning October 1, 1895, there were seventy-five poles and twenty miles of wire, and for the three succeeding years, beginning October 1, 1896, there were thirty-six poles and twelve miles of wire maintained by the defendant in said borough." Plaintiff then rested, and defendant offered evidence tending to show that the wires were used as through wires, for the transmission of messages between the different States, and the United States and foreign countries; that the company had no office at New Hope, which it operated itself, but that the Philadelphia and Reading Railroad Company handled the business there, and transferred it to the Western Union at Philadelphia; that no part of the business that went to or from New Hope went over these lines of wires and poles; and that the local business handed to the Western Union at Philadelphia amounted to from about seven to seven and one-half dollars per month. The evidence further tended to show that the cost value of its lines through New Hope was about $372, and that the cost of inspection, repairs and maintenance of the plant of the company had averaged for thirteen years one dollar and forty-nine and one-half cents per wire per annum; that since October, 1894, the borough had not expended any money on account

of the poles and wires of the company: that its expenditures were for repairing streets, street lamps, moderate sums in payment of official services, &c., and that when on holidays the burgess saw fit to appoint a policeman he often called on the constable, who was generally paid $2.50 per day. A lineman testified that during those years the borough never did anything, to his knowledge, "in the way of inspecting or repairing or removing or anything else in connection with the poles and wires of those telegraph companies." Defendant contended that the requirement of payment of the license fee in question amounted to a regulation of commerce, and that the ordinance was therefore void.

The court left it to the jury to find whether the license fee exceeded what was reasonable under the circumstances. The jury returned a verdict in favor of the plaintiff, and judgment was rendered thereon, which on error to the Superior Court was affirmed. 16 Pa. Superior Ct. Rep. 306. The Supreme Court of Pennsylvania refused to allow an appeal to that court.

Mr. Chief Justice FULLER delivered the opinion of the Court.

It is conceded that the borough had the right in the exercise of its police power to impose a reasonable license fee upon telegraph poles and wires within its limits, and that an ordinance imposing such fee is to be taken as *prima facie* reasonable. But it is insisted that on the evidence in this case the presumption of reasonableness is rebutted, and that the ordinance as administered is void because a regulation of interstate commerce. While in the exercise of its control over its streets, it is admitted that the borough may supervise the location of the poles erected to sustain the wires of the plaintiff in error, may require them to be marked, may make such inspection of them as may be necessary to protect the public welfare, and may impose a reasonable license fee for the cost of such regulation and supervision, and of the issuing of such permits as may be required for the enforcement thereof, yet it is contended that if the license fee turned out to be in excess of the amount necessary to reimburse the municipality the ordinance became unreasonable and invalid. The Superior Court in its opinion referred to many decisions of the Supreme Court of Pennsylvania as definitively establishing, among other propositions, "that in an action to recover the license fee for a particular year, the same being payable at the beginning of the year, the fact that the borough or city did not expend money for inspection, supervision, or police surveillance of the poles and wires in that year is not a defense," and "that the courts will not declare such ordinance void because of the alleged unreasonableness of the fee charged, unless the unreasonableness be so clearly apparent as to demonstrate an abuse of discretion on the part of the municipal authorities." And it was

said that in many of the cases cited the license fee was the same as that imposed by this ordinance. 16 Superior Ct. Rep. 309. The Supreme Court affirmed the judgment in a similar case on the opinion given below in this. 202 Pa. 532.

In *Chester City* v. *Telegraph Company*, 154 Pa. 464, in which it was averred in the affidavit of defense that the rates charged were at least five times the amount of the expense involved in the supervision exercised by the municipality, the Supreme Court said: "For the purposes of this case we must treat this averment as true, as far as it goes. The difficulty is it does not go far enough. It refers only to the usual, ordinary or necessary expense of municipal officers, of issuing licenses and other expenses thereby imposed upon the municipality. It makes no reference to the liability imposed upon the city by the erection of telegraph poles. It is the duty of the city to see that the poles are safe, and properly maintained, and should a citizen be injured in person or property by reason of a neglect of such duty, an action might lie against the city for the consequences of such neglect. It is a mistake therefore to measure the reasonableness of the charge by the amount actually expended by the city for a particular year, to the particular purposes specified in the affidavit."

In *Taylor Borough* v. *Telegraph Company*, 202 Pa. 583, the Supreme Court said: "Clearly the reasonableness of the fee is not to be measured by the value of the poles and wires or of the land occupied, nor by the profits of the business. The elements which enter into the charge are the necessary or probable expense incident to the issuing of the license and the probable expense of such inspection, regulation and police surveillance as municipal authorities may lawfully give to the erection and maintenance of the poles and wires. . . . Whether or not the fee is so obviously excessive as to lead irresistibly to the conclusion that it is exacted as a return for the use of the streets, or is imposed for revenue purposes, is a question for the courts and is to be determined upon a view of the facts, not upon evidence consisting of the opinions of witnesses as to the proper supervision that the municipal authorities might properly exercise and the expense of the same." And see *City of Philadelphia* v. *Western Union Telegraph Company*, 89 Fed. Rep. 454.

Concurring in these views in general, we think it would be going much too far for us to decide that the test set up by the plaintiff in error must be necessarily applied, and the ordinance held void because of failure to meet it. As the Supreme Court pointed out, the elements entering into the charge are various, and the Court of Common Pleas, the Superior Court, and the Supreme Court of Pennsylvania have held it to be reasonable, and we cannot say that their conclusion is so manifestly wrong as to justify our interposition.

This license fee was not a tax on the property of the company, or on its transmission of messages, or on its receipts from such transmission, or on its occupation or business, but was a charge in the enforcement of local governmental supervision, and as such not in itself obnoxious to the clause of the Constitution relied on. *St. Louis* v. *Telegraph Company*, 148 U. S. 92; 149 U. S. 465.

Judgment affirmed.

Mr. Justice WHITE, Mr. Justice PECKHAM and Mr. Justice MCKENNA dissented.

True copy.

Test:

Clerk Supreme Court, U. S.